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## Antitrust Remedies Revisited

In the 115-year history of federal antitrust law, much has been written about substantive liability standards. Comparatively little has been written about antitrust remedies. This inattentiveness to remedy was underscored by the *Microsoft*<sup>1</sup> case wherein the Antitrust Division, having successfully adjudicated Microsoft a monopolist, scrambled to fashion an appropriate remedy, first seeking to break up Microsoft<sup>2</sup> and ultimately reversing itself and settling for a conduct decree.<sup>3</sup> Putting aside the question of whether the relief in *Microsoft* was adequate, the fact is that the case law on equitable remedies in antitrust is sparse and dated, leaving critics to question whether the antitrust laws are sufficiently nimble to meet the needs of a fast-paced, high-tech economy.

Moreover, changes in enforcement priorities at the Antitrust Division, which have led to a heavy emphasis on criminal enforcement,<sup>4</sup> have rekindled the debate over the continuing need for mandatory treble damages in private civil actions. The right of private action, coupled with more aggressive antitrust enforcement by state agencies and foreign governments, has led critics to argue that antitrust enforcement in the United States is unduly punitive and may overdeter by chilling potentially procompeti-

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<sup>1</sup> *United States v. Microsoft Corp.*, 87 F. Supp. 2d 30 (D.D.C. 2000), *aff'd in part, rev'd in part*, 253 F.3d 34 (D.C. Cir.), *cert. denied*, 534 U.S. 952 (2001).

<sup>2</sup> *United States v. Microsoft Corp.*, 97 F. Supp. 2d 59 (D.D.C. 2000), *aff'd in part, rev'd in part*, 253 F.3d 34 (D.C. Cir.), *cert. denied*, 534 U.S. 952 (2001).

<sup>3</sup> *United States v. Microsoft Corp.*, 231 F. Supp. 2d 144 (D.D.C. 2002) (opinion and order approving consent decree), *aff'd sub nom. Massachusetts v. Microsoft Corp.*, 373 F.3d 1199 (D.C. Cir. 2004).

<sup>4</sup> R. Hewitt Pate, Assistant Attorney General Antitrust Division, Vigorous and Principled Antitrust Enforcement: Priorities and Goals, Address Before the Antitrust Section of the American Bar Association, at 2 (Aug. 12, 2003) ("Criminal antitrust enforcement continues to be a core priority of the Antitrust Division."), available at <http://www.usdoj.gov/atr/public/speeches/201241.htm> (last visited June 6, 2005).

tive behavior.<sup>5</sup> Finally, the relatively recent spate of multiparty, multiforum, multijurisdictional antitrust actions has led some, including Congress, to question whether current procedures for handling antitrust litigation are fair and adequate.<sup>6</sup>

This Article will: (1) describe the current antitrust enforcement picture; (2) identify problems with the present state of enforcement; and (3) propose changes, both substantive and procedural, that will improve overall antitrust enforcement.

## I

### A SNAPSHOT OF THE CURRENT STATE OF ANTITRUST ENFORCEMENT

In enacting the antitrust laws, Congress decreed that competition would be the guiding principle governing commercial intercourse.<sup>7</sup> Indeed, the Sherman Act<sup>8</sup> has been described by the Supreme Court as the “Magna Carta of free enterprise.”<sup>9</sup> To assure unfettered markets and to encourage “the unrestrained interaction of competitive forces,” Congress created a tripartite enforcement mechanism which empowered the Department of Justice Antitrust Division, the Federal Trade Commission (“FTC”), and private parties to prosecute antitrust violations. Nearly a century after enactment of the Sherman Act, Congress passed the Hart-Scott-Rodino Antitrust Improvements Act of 1976<sup>10</sup> (“HSR”) which empowered states’ attorneys general to

<sup>5</sup> William Breit & Kenneth G. Elzinga, *Private Antitrust Enforcement: The New Learning*, 28 J.L. & ECON. 405, 412-13 (1985).

<sup>6</sup> Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4.

<sup>7</sup> See *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958).

The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality, and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the Act is competition.

*Id.* ABA Section of Antitrust Law, *The State of Federal Antitrust Enforcement: Report of the Task Force on Federal Antitrust Agencies*, at 12 (2001) [hereinafter *Task Force*] (“[E]ffective and appropriate antitrust enforcement is critical to the performance of a market economy.”), available at [http://www.abanet.org/antitrust/pdf\\_docs/antitrustenforcement.pdf](http://www.abanet.org/antitrust/pdf_docs/antitrustenforcement.pdf) (last visited June 8, 2005).

<sup>8</sup> 15 U.S.C. § 1 (2000).

<sup>9</sup> *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972).

<sup>10</sup> Pub. L. No. 94-435, 90 Stat. 1383 (1976).

sue *parens patriae* on behalf of consumers injured in price-fixing cases.<sup>11</sup>

### A. Enforcement of Federal Antitrust Laws

#### 1. Department of Justice Antitrust Division

The Antitrust Division is armed with broad civil and criminal enforcement powers.

##### a. Criminal Powers

Violations of the Sherman Act may give rise to both criminal and civil liability, but the statute is silent as to the circumstance in which either or both remedies may be sought.<sup>12</sup> As a matter of Justice Department policy, criminal sanctions are reserved for the most egregious violations of law condemned by the courts as per se illegal—price-fixing among competitors and agreements among competitors to divide markets and thereby raise prices.<sup>13</sup> Violations of the Sherman Act are felonies and convicted corporations currently face fines of up to \$100 million thereunder.<sup>14</sup> Convicted individuals currently face fines of up to \$1 million and are virtually guaranteed jail time.<sup>15</sup> Prosecutors, however, are empowered under alternative sentencing provisions to seek even larger fines—up to twice the gain to the defendant or twice the loss to the victims.<sup>16</sup> Thus, for example, Hoffman-LaRoche was fined \$500 million following its guilty plea to charges of price-fixing as part of an international cartel in vitamins.<sup>17</sup> Criminal

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<sup>11</sup> 15 U.S.C. §§ 15c-15h (2000).

<sup>12</sup> *Id.* § 1.

<sup>13</sup> See Gary R. Spratling, Deputy Assistant Attorney General Antitrust Division, Transparency in Enforcement Maximizes Cooperation from Antitrust Offenders, Address Before the Fordham Corporate Law Institute 26th Annual Conference on International Antitrust Law & Policy (Oct. 15, 1999), available at <http://www.usdoj.gov/aatr/public/speeches/3952.htm> (last visited June 10, 2005); Anne K. Bingaman, Assistant Attorney General Antitrust Division, & Gary R. Spratling, Deputy Assistant Attorney General Antitrust Division, Criminal Antitrust Enforcement, Joint Address Before the Antitrust Section of the American Bar Association Criminal Antitrust Law and Procedure Workshop (Feb. 23, 1995), available at <http://www.usdoj.gov/aatr/public/speeches/95-02-23.txt> (last visited June 10, 2005).

<sup>14</sup> 15 U.S.C. § 1. Recently enacted legislation has raised the ceiling on fines for corporations under the Sherman Act from \$10 million to \$100 million. Pub. L. No. 108-237, § 215, 118 Stat. 661, 668 (2004). See *infra* notes 110-15 and accompanying text.

<sup>15</sup> 15 U.S.C. § 1. Legislation signed into law in June 2004 raises the maximum fine for individuals from \$350,000 to \$1 million. § 215, 118 Stat. at 668.

<sup>16</sup> 18 U.S.C. § 3571(d) (2000).

<sup>17</sup> *In re* Vitamins Antitrust Litig., 209 F.R.D. 251, 254 n.4 (D.D.C. 2002).

sanctions in antitrust cases, while not insignificant, have historically been much lower.

In addition to having leeway in choosing antitrust remedies, the Antitrust Division exercises substantial prosecutorial discretion in determining which types of violations should be prosecuted and which violators should be pursued. To assist the government in ferreting out wrongful conduct and to encourage perpetrators to cease their illegal acts, the Antitrust Division has developed an Amnesty Program covering both corporations<sup>18</sup> and individuals.<sup>19</sup> Under this program, the first wrongdoer to come forward and to reveal to the government the existence of the unlawful conspiracy will be spared any criminal sanctions, provided that it cooperates with the investigation and was not a ringleader of the conspiracy.<sup>20</sup> In the view of the Antitrust Division, the Amnesty Program has been critical to the successful prosecution of antitrust conspiracies in the last decade, most notably in the international arena.<sup>21</sup>

*b. Civil Powers*

In addition to criminal sanctions, the Antitrust Division may

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<sup>18</sup> U.S. Dep't of Justice Antitrust Div., *Corporate Leniency Policy—1993*, in 4 Trade Reg. Rep. (CCH) ¶ 13,113, at 20,649-21 (Aug. 16, 1994).

<sup>19</sup> U.S. Dep't of Justice Antitrust Div., *Leniency Policy For Individuals—1994*, in 4 Trade Reg. Rep. (CCH) ¶ 13,114, at 20,649-22 (Aug. 16, 1994).

<sup>20</sup> U.S. Dep't of Justice Antitrust Div., *supra* note 18, ¶ 13,113, at 20,649-21; U.S. Dep't of Justice Antitrust Div., *supra* note 19, ¶ 13,114, at 20,649-22.

<sup>21</sup> Scott D. Hammond, Dir. of Criminal Enforcement Antitrust Div., *Detecting and Deterring Cartel Activity through an Effective Leniency Program*, Address Before the International Workshop on Cartels, at 1-2 (Nov. 21, 2000), *available at* <http://www.usdoj.gov/atr/public/speeches/9928.htm> (last visited June 10, 2005).

Over the last five years, the United States' Corporate Leniency Program ("Amnesty Program") has been responsible for detecting and cracking more international cartels than all of our search warrants, secret audio or video tapes, and FBI interrogations combined. It is, unquestionably, the single greatest investigative tool available to anti-cartel enforcers. An effective Leniency Program will lead cartel members, in some cases, to confess their conduct even before an investigation is opened. In other cases, it will induce organizations already under investigation to abandon the cartel stonewall, race to the government, and provide evidence against the other cartel members. While the availability of some investigative techniques, such as consensual monitoring or the compulsion of sworn testimony, may be limited or nonexistent in jurisdictions where hardcore cartel activity is not a criminal offense, Leniency Programs can potentially be utilized in any jurisdiction where such conduct is treated as a criminal, civil or administrative offense.

*Id.*

seek treble damages where the federal government has suffered harm in its proprietary capacity by reason of an antitrust violation.<sup>22</sup> For example, if a federal hospital purchased price-fixed drugs from a defendant, the government may sue civilly to recover three times the overcharges. The Antitrust Division also has broad powers to enjoin violations or likely violations of the antitrust laws that affect consumers generally.<sup>23</sup> For example, the United States recently obtained an injunction against Visa and MasterCard, enjoining each organization from enforcing provisions in their respective bylaws which prohibited members' banks from issuing credit cards of rival networks, including American Express and Discover.<sup>24</sup> In addition, under the HSR, the Antitrust Division is empowered to review mergers prior to their consummation.<sup>25</sup> The HSR requires parties to a merger to notify both the Antitrust Division and the FTC of the transaction, and prohibits the parties from consummating the merger for thirty days unless the government agrees to permit the merger to go forward prior to the expiration of the thirty-day period.<sup>26</sup> If the government needs additional information in order to evaluate the transaction, it may make a "second request" for that information.<sup>27</sup> In that case, the merger is further delayed until thirty days after the parties have fully complied with the second request.<sup>28</sup> The vast majority of HSR merger filings are cleared without challenge, and many are cleared prior to the expiration of the thirty-day period. On the other hand, if the government concludes that the merger is likely to have substantial anticompetitive effects, it may sue in federal court to enjoin the merger. Often, after the government has identified the troublesome aspects of a merger, it will agree to drop its opposition if the merging parties make certain divestitures prior to concluding their transactions by entering into a consent decree.<sup>29</sup>

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<sup>22</sup> 15 U.S.C. § 15a (2000).

<sup>23</sup> *Id.* § 16.

<sup>24</sup> *United States v. VISA U.S.A., Inc.*, 344 F.3d 229 (2d Cir. 2003).

<sup>25</sup> 15 U.S.C. § 18a.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* As a practical matter, the issuance of a second request will delay a merger for at least six months.

<sup>29</sup> See, e.g., *United States v. AlliedSignal, Inc.*, 2000-2 Trade Cas. (CCH) ¶ 73,023 (D.D.C. 2000); *United States v. AT&T Corp.*, 2000-2 Trade Cas. (CCH) ¶ 73,096 (D.D.C. 2000) (describing that in AT&T's acquisitions of MediaOne, MediaOne was required to divest its high speed internet access company). See generally ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 378-88 (5th Ed. 2002).

## 2. *The FTC*

The FTC was created by Congress in 1914 as an independent federal regulatory agency to administer the FTC Act.<sup>30</sup> The principal operative provision of the FTC Act is section 5, which prohibits “unfair methods of competition.”<sup>31</sup> The FTC consists of a five-member commission appointed by the President that oversees a Bureau of Competition, a Bureau of Consumer Protection, and a Bureau of Economics.<sup>32</sup> The FTC’s antitrust function is housed in the Bureau of Competition.<sup>33</sup> The Bureau of Competition has coordinate jurisdiction with the Justice Department to enforce the Clayton Act and sole power to police unfair methods of competition under Section 5 of the FTC Act.<sup>34</sup> The FTC has no criminal powers, nor does it have authority to recover civil damages. The courts, nevertheless, have held that the FTC does have authority to order disgorgement of ill-gotten gains obtained by those engaging in unfair methods of competition.<sup>35</sup> In addition, the FTC is empowered to levy substantial fines against those who fail to comply with FTC orders.<sup>36</sup>

The principal enforcement weapon in the FTC arsenal is the cease and desist order.<sup>37</sup> While the FTC has broad antitrust powers and has exercised those powers in a number of areas, its main antitrust function in the past two decades has been sharing the role of merger enforcement with the Antitrust Division under the HSR as described above.

## 3. *Private Actions*

The antitrust laws also create a private right of action for individuals or entities harmed by anticompetitive acts.<sup>38</sup> Congress created the private right of action to supplement public enforce-

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<sup>30</sup> Act of Sept. 26, 1914, ch. 311, 38 Stat. 717, 719; 15 U.S.C. §§ 41-58 (2000).

<sup>31</sup> 15 U.S.C. § 45 (2000).

<sup>32</sup> *Id.* § 41; Fed. Trade Comm’n, *Internal Organization and Operations*, in 4 Trade Reg. Rep. (CCH) ¶ 9555, at 16,433 (Dec. 20, 2000).

<sup>33</sup> Fed. Trade Comm’n, *supra* note 32, ¶ 9555, at 16,433-34.

<sup>34</sup> *Id.*

<sup>35</sup> *FTC v. Mylan Labs., Inc.*, 62 F. Supp. 2d 25 (D.D.C. 1999).

<sup>36</sup> See Press Release, Federal Trade Commission, Federal Trade Commission Obtains Civil Penalty Against William H. Gates III for Violation of Hart-Scott-Rodino Act (May 3, 2004) (describing how the FTC imposed a civil penalty of \$800,000 on Microsoft head Bill Gates for HSR disclosure violations), available at <http://www.ftc.gov/opa/2004/05/gates.htm> (last visited June 10, 2005).

<sup>37</sup> 15 U.S.C. § 45(b) (2000).

<sup>38</sup> *Id.* § 15.

ment because it was aware that the government would not have the necessary resources to uncover, investigate, and prosecute all violations of the antitrust laws.<sup>39</sup> To encourage private enforcement, Congress built in powerful incentives: mandatory treble damages; attorneys' fees for prevailing plaintiffs (although not for prevailing defendants);<sup>40</sup> and in cases where a civil action follows a successful criminal prosecution, the factual findings in the criminal action are given prima facie effect in the civil action and, if applicable, issue preclusive effect.<sup>41</sup> Private parties may also seek injunctive relief in appropriate cases.<sup>42</sup>

#### 4. States

Notwithstanding the fact that state regulation of monopolies and monopolistic practices predates enactment of federal antitrust laws,<sup>43</sup> neither the Sherman Act nor the Clayton Act as originally enacted provided any formal enforcement role for states. In the wake of enactment of anti-monopoly legislation at the federal level, many states passed "little Sherman Acts" to police intrastate restraints of trade that were outside the scope of federal jurisdiction.<sup>44</sup> Most of these statutes sat dormant for decades. State enforcement of federal antitrust laws was initially limited. Subject matter jurisdiction over Sherman Act and Clayton Act claims was exclusively federal and therefore state plaintiffs could not utilize state courts to bring claims under federal law.<sup>45</sup> Moreover, it was not until the 1942 Supreme Court decision in *Georgia v. Evans*<sup>46</sup> that a state victimized by an antitrust violation was recognized as a "person" within the meaning of

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<sup>39</sup> See, e.g., *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 642 (1981) (explaining that the private action "supplements federal enforcement and fulfills the objects of the statutory scheme").

<sup>40</sup> 15 U.S.C. § 15. Prevailing defendants may, however, be entitled to sanctions if the plaintiff's suit is frivolous and those sanctions may include attorneys' fees. See FED. R. CIV. P. 11; see also 28 U.S.C. § 1927 (2000) (allowing sanctions against attorneys for vexatious behavior).

<sup>41</sup> 15 U.S.C. § 16.

<sup>42</sup> See *id.* § 23.

<sup>43</sup> See, e.g., *Richardson v. Buhl*, 43 N.W. 1102 (Mich. 1889). See generally 1 EARL W. KINTNER, *FEDERAL ANTITRUST LAW* § 4.1 (1980).

<sup>44</sup> See, e.g., N.Y. GEN. BUS. LAW § 340 (McKinney 2002) (New York's Donnelly Act).

<sup>45</sup> 15 U.S.C. §§ 15, 26; see *Marrese v. Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 379-80 (1985); *Freeman v. Bee Mach. Co.*, 319 U.S. 448, 451 n.6 (1943).

<sup>46</sup> 316 U.S. 159 (1942).

Section 4 of the Clayton Act so as to be eligible to sue for treble damages.

Although state enforcement of federal antitrust laws picked up marginally in the wake of *Georgia v. Evans*, it was not until the mid-1970s that Congress created a formal enforcement role for the states. As discussed above,<sup>47</sup> the HSR authorized state attorneys general to sue *parens patriae* to recover treble damages on behalf of natural persons residing in their respective states who had been victimized by price-fixing.<sup>48</sup> The HSR *parens patriae* provision, however, was effectively rendered dead on arrival a year later by the Supreme Court's decision in *Illinois Brick Co. v. Illinois*<sup>49</sup> which limited the universe of plaintiffs injured within the meaning of Section 4 of the Clayton Act to those who had purchased directly from defendants, and thus excluded most consumers as plaintiffs.

Despite *Illinois Brick*, state involvement in antitrust enforcement did not wane. First, states enacted *Illinois Brick* repealers which permitted indirect purchasers to sue in state court.<sup>50</sup> Sec-

<sup>47</sup> See *supra* note 10 and accompanying text.

<sup>48</sup> See 15 U.S.C. §§ 15c-15h (2000).

<sup>49</sup> 431 U.S. 720 (1977). *Illinois Brick* has been the subject of extensive debate and reform proposals. See *Task Force*, *supra* note 7, at 25-26; see, e.g., ABA Section of Antitrust Law, *Report of the Indirect Purchaser Task Force*, 63 ANTITRUST L.J. 993 (1995); ABA Section of Antitrust Law, *Report of the American Bar Association Section of Antitrust Law Task Force to Review the Supreme Court's Decision in California v. ARC American Corp.*, 59 ANTITRUST L.J. 273 (1990); ABA Section of Antitrust Law, *Report of the American Bar Association Section of Antitrust Law Task Force to Review Proposed Legislation to Repeal or Modify Illinois Brick*, 52 ANTITRUST L.J. 841 (1983); ABA Section of Antitrust Law, *Report of the American Bar Association Antitrust Law Section Task Force on Legislative Alternatives Concerning Illinois Brick Co. v. Illinois*, 46 ANTITRUST L.J. 1137 (1978).

<sup>50</sup> Some thirty states permit indirect purchaser suits. Twenty-five states and the District of Columbia have enacted *Illinois Brick* repealer statutes. See, e.g., ALA. CODE § 6-5-60(a) (1993) (Alabama); ARIZ. REV. STAT. § 44-1408(B) (2005) (Arizona); CAL. BUS. & PROF. CODE § 16750(a) (West 1997) (California); COLO. REV. STAT. § 6-4-111(2) (2002) (Colorado) (authorizing the state attorney general to bring suit for indirect injury to any government or public entity); DEL. CODE ANN. tit. 6, § 2108(B) (2005) (Delaware); D.C. CODE ANN. § 28-4509 (2001) (District of Columbia); HAW. REV. STAT. §§ 480-3, -13, -14 (1993 & Supp. 2001) (Hawaii) (allowing the state attorney general to file class action suit on behalf of indirect purchasers); IDAHO CODE ANN. 48-108(2) (2003) (Idaho) (permitting the state attorney general as *parens patriae* to bring suit); 740 ILL. COMP. STAT. 10/7-2 (2002) (Illinois); KAN. STAT. ANN. § 50-161(b) (Supp. 2002) (Kansas); ME. REV. STAT. ANN. tit. 10, § 1104(1) (West 1997) (Maine); MD. CODE ANN., COM. LAW II § 11-209(b) (2000) (Maryland) (allowing the state and its subdivisions to bring indirect purchaser suits); MICH. COMP. LAWS § 445.778(2) (2001) (Michigan); MINN. STAT. § 325D.57 (1995) (Minnesota); MISS. CODE ANN. § 75-21-9 (2000) (Mississippi); NEB. REV. STAT.



ond, state enforcement became important in the early Reagan years when antitrust enforcement at the federal level declined due in part to a string of decisions unfavorable to antitrust plaintiffs issued by the Supreme Court in the late 1970s,<sup>51</sup> and also due in part to the minimalist enforcement policies adhered to by the Antitrust Division and a significant reduction in resources allocated to that division.<sup>52</sup>

§ 59-821 (Supp. 2002) (Nebraska); NEV. REV. STAT. 598A.210(2) (Supp. 2001) (Nevada); N.M. STAT. ANN. § 57-1-3(A) (Michie 2000) (New Mexico); N.Y. GEN. BUS. LAW § 340(6) (McKinney Supp. 2003) (New York); N.D. CENT. CODE § 51-08.1-08(3) (1999) (North Dakota); OR. REV. STAT. § 646.775 (2001) (Oregon) (allowing attorney general to sue on behalf of indirect purchasers); R.I. GEN. LAWS § 6-26-12 (2001) (Rhode Island) (same); S.D. CODIFIED LAWS § 370-1-33 (Michie 2000) (South Dakota); VT. STAT. ANN. tit. 9, § 2465(b) (Supp. 2002) (Vermont); WIS. STAT. § 133.18(1)(a) (2001) (Wisconsin).

Three states permit indirect purchaser suits by judicial decision: Iowa, North Carolina, and Tennessee. *See Comes v. Microsoft Corp.*, 646 N.W.2d 440, 451 (Iowa 2002); *Hyde v. Abbott Labs., Inc.*, 473 S.E.2d 680, 684 (N.C. Ct. App. 1996); *Blake v. Abbott Labs., Inc.*, 1996-1 Trade Cas. (CCH) ¶¶ 71,369, 76,854 (Tenn. Ct. App. 1996).

<sup>51</sup> *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977); *Cont'l T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977); *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

<sup>52</sup> *See Robert Pitofsky, Antitrust at the Turn of the Twenty-First Century: A View from the Middle*, 76 ST. JOHN'S L. REV. 583, 585 (2002).

The heightened enforcement levels of the 1960s led to a reaction in the Bar, in the private sector, and in academia. The result was a steady but substantial moderation in antitrust enforcement. By the 1980s, a little more than a decade later, all that was left of antitrust enforcement at both the Antitrust Division of the DOJ and the FTC were regular challenges to hard-core cartels, some facilitating practices that supported cartel behavior, and a few challenges to very large horizontal mergers that were thought to contribute to high concentration and cartel-like behavior. During the eight years of the Reagan Administration, there was an absence of enforcement initiated against vertical and conglomerate mergers, monopolization and attempts to monopolize—at least after the DOJ settled the earlier challenge to AT&T by supervising a breakup of the telephone monopoly, vertical distribution arrangements, including minimum price-fixing, exclusive dealing arrangements, and tie-in sales, boycotts, and all forms of discriminatory pricing. An effort to restore something more than a minimalist antitrust enforcement program was initiated during the first Bush Administration, and many of the practices deleted from enforcement efforts were restored during the period 1988-1992.

*Id.* [footnotes omitted]. *But see* William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 ANTITRUST L.J. 377, 378, 392 (2003) (characterizing the Pitofsky view as the “pendulum narrative,” the “key factual assumptions” of which “are demonstrably incorrect”). Rejecting the so-called pendulum narrative, Kovacic adopts a view of the U.S. antitrust experience that “more strongly emphasizes elements of continuity and the cumulative nature of public antitrust enforcement.” *Id.* at 381. *See generally* Robert A. Skitol, *The Shifting Sands of Antitrust Policy: Where It Has Been, Where It Is Now, Where It Will Be In Its*

This is not to suggest that the Reagan Antitrust Division sat on its hands. On the contrary, it pursued an active criminal enforcement agenda, aggressively prosecuting price-fixing and bid-rigging in the road building and government procurement areas.<sup>53</sup> It promulgated Merger Guidelines in 1982,<sup>54</sup> which serve as the foundation for modern merger control policies and which, with some amendment, are still in force today.<sup>55</sup> Using the amicus process, the Reagan Antitrust Division sought to assist the courts in deciding cases consistent with what it viewed as rational antitrust policies.<sup>56</sup>

Notwithstanding these aggressive activities in the criminal realm, overall antitrust enforcement suffered. Severe budget cuts at the Antitrust Division limited the resources available to detect and prosecute violations. In pursuing its criminal agenda, the Antitrust Division in the 1980s abandoned the resource-intensive, industry-wide enforcement actions of the type brought by previous administrations. These policy choices, together with a series of defendant-friendly Supreme Court decisions in the late 1970s, noted above,<sup>57</sup> led to a decline in private enforcement. Without government leadership, private parties lacked the resources necessary to detect and prosecute price-fixing on an industry-wide basis. Moreover, the road building and procurement cases that the government did actively prosecute were transaction specific and rarely generated significant follow-on litigation in the private sector. In the merger area, few transactions were challenged by the government under the new Merger Guidelines.<sup>58</sup> Again, the lack of activity by public enforcers had a negative spill-over effect on private enforcement. Finally, to the dismay of many, the government attempted to use the amicus process to reshape long-standing antitrust doctrine including the per se ban on minimum resale price maintenance.<sup>59</sup>

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*Third Century*, 9 CORNELL J.L. & PUB. POL'Y 239 (1999) (offering an historical narrative of antitrust enforcement policies); *Task Force*, *supra* note 7, at 10 (noting that some observers view the antitrust policies of the 1960s as "overly aggressive," and some view the antitrust policies of the 1980s as "overly tentative").

<sup>53</sup> Kovacic, *supra* note 52, at 418-19.

<sup>54</sup> U.S. Dep't of Justice Antitrust Div., *Merger Guidelines—1982*, in 4 Trade Reg. Rep. (CCH) ¶ 13,102, at 20,528 (1988).

<sup>55</sup> Kovacic, *supra* note 52, at 435; see Skitol, *supra* note 52, at 250-53.

<sup>56</sup> See Skitol, *supra* note 52, at 251-52.

<sup>57</sup> See *supra* note 51 and accompanying text.

<sup>58</sup> See Pitofsky, *supra* note 52, at 585.

<sup>59</sup> *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984). In *Monsanto*, the

Perceiving a gap in public antitrust enforcement, state attorneys general, both individually and through the network established by the National Association of Attorneys General (“NAAG”), stepped in to fill that gap. State attorneys general not only prosecuted antitrust cases, but also issued policy statements on mergers<sup>60</sup> and vertical restraints<sup>61</sup> that were at odds with federal guidelines promulgated by the Antitrust Division.<sup>62</sup> The emergence of state agencies as active antitrust enforcers has been a source of ongoing friction between state and federal regulators over who has the last say on policy matters. More recently, foreign governments have expressed concern that, because of the states’ emergence as regulators, the United States no longer speaks its antitrust policy with one voice, thus making it difficult for foreign firms to intelligently weigh commercial risks.<sup>63</sup> Similar concerns have been expressed by the business community, both domestic and foreign.<sup>64</sup>

Despite these criticisms, and despite the fact that antitrust enforcement at the federal level picked up markedly in the 1990s, the states’ interest in antitrust enforcement has not waned. In the wake of the Supreme Court’s decision in *California v. ARC America Corp.*,<sup>65</sup> states have carved out an enforcement niche in indirect purchaser suits arising under state law. Still, the proper role of the states in antitrust enforcement remains a topic of

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Justice Department had been prepared to file an amicus brief that would argue for an end to *per se* treatment in minimum resale price maintenance cases. See Stephen Calkins, *The Antitrust Conversation*, 68 ANTITRUST L.J. 625, 644 & nn.117-18 (2001). This plan did not play well in Congress, which threatened to withhold operating funds to the Antitrust Division if that brief was filed. *Id.* at 644 & n.117. The Justice Department backed down; while it did file an amicus brief in the case, the Antitrust Division did not propose overruling the *per se* ban on resale price maintenance. *Id.*

<sup>60</sup> Nat’l Ass’n of Attorneys Gen., *Horizontal Merger Guidelines—1993*, in 4 Trade Reg. Rep. (CCH) ¶ 13,406, at 21,193 (Apr. 13, 1993).

<sup>61</sup> Nat’l Ass’n of Attorneys Gen., *Vertical Restraints Guidelines*, in 4 Trade Reg. Rep. (CCH) ¶ 13,400, at 21,151 (Apr. 4, 1995).

<sup>62</sup> Compare U.S. Dep’t of Justice & Fed. Trade Comm’n, *Merger Guidelines—1992*, in 4 Trade Reg. Rep. (CCH) ¶ 13,104, at 20,569 (Apr. 17, 1997), with U.S. Dep’t of Justice, *Vertical Restraint Guidelines*, in 4 Trade Reg. Rep. (CCH) ¶ 13,105, at 20,575 (Aug. 17, 1993) (rescinded Aug. 10, 1993).

<sup>63</sup> See Edward T. Swaine, *The Local Law of Global Antitrust*, 43 WM. & MARY L. REV. 627, 761 (2001) (“[E]ven where state and foreign enforcers agree that particular conduct or a particular transaction poses antitrust concerns, conflicts may arise over state cherry-picking.”).

<sup>64</sup> *Id.* at 760-61; see Stephen Labaton, *From the Pipeline to the Courtroom; Gap on BP Amoco-ARCO Deal is Wide*, N.Y. TIMES, Jan. 4, 2000 at C1, C23 (describing concessions demanded by state regulators as a condition for merger approval).

<sup>65</sup> 490 U.S. 93 (1989).

heated debate. Judge Richard Posner, over a decade after *ARC America* was handed down, proposed virtual elimination of state antitrust enforcement and of state antitrust laws.<sup>66</sup> Defenders of state antitrust enforcement, notably Professor Harry First, argue that although “[f]itting somewhat uncomfortably into this dual system” of public and private enforcement of federal antitrust law, state antitrust enforcement remains vital to the protection of consumer interests.<sup>67</sup> Professor First notes that in obtaining recoveries *parens patriae* on behalf of injured citizens, “the states in no way conflict with federal enforcement.”<sup>68</sup> Professor First further argues that states can bring meaningful value added to antitrust enforcement in those local cases where “a state enforcement agency can more easily understand the market and more likely benefit consumers.”<sup>69</sup> Even under Professor First’s value-added approach, however, it is hard to make a case for having the states play a lead role in merger enforcement. The need for United States antitrust enforcers to speak with one voice grows more compelling as the economy becomes more globalized. The prospect of having to obtain the approval of not only the federal government, but also that of one, some, or all of the fifty states would prove overwhelming. Moreover, it would be quite costly to foreign firms attempting to consummate cross-border mergers.

While cooperation between federal and state antitrust enforcers has improved markedly in the merger area,<sup>70</sup> turf battles continue to be fought. The federal government continues to be the senior partner in cooperative enforcement ventures. The states, however, have firmly established themselves as players in the antitrust field.

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<sup>66</sup> Richard A. Posner, *Antitrust in the New Economy*, 68 ANTITRUST L.J. 925, 940-42 (2001).

<sup>67</sup> Harry First, *Delivering Remedies: The Role of the States in Antitrust Enforcement*, 69 GEO. WASH. L. REV. 1004, 1004 (2001).

<sup>68</sup> *Id.* at 1039.

<sup>69</sup> *Id.* at 1036. Professor First acknowledges, however, that this value-added approach “does not make for a neat division of responsibility between state and federal enforcers.” *Id.*

<sup>70</sup> See Fed. Trade Comm’n et al., *Protocol for Joint Federal/State Merger Investigations*, in 4 Trade Reg. Rep. (CCH) ¶ 13,420, at 21,213 (Mar. 18, 1998); see also Skitol, *supra* note 52, at 253-54 (noting the efforts of James Rill of the Antitrust Division and Janet Steiger of the FTC during the first Bush Administration to eliminate friction with state enforcers).

### 5. Foreign Enforcement of the U.S. Antitrust Laws

Foreign plaintiffs constitute a special class of potential antitrust enforcers. Because the antitrust laws extend only to cases involving the domestic or foreign commerce of the United States, cases involving foreign plaintiffs typically raise threshold issues of standing and subject matter jurisdiction.<sup>71</sup> In *Pfizer, Inc. v. India*,<sup>72</sup> the Supreme Court examined the question of whether a foreign government is a “person” entitled to sue for treble damages under Section 4 of the Clayton Act. In holding that foreign governments were indeed persons, and therefore were so entitled, the Court in dicta also addressed the question of whether foreign purchasers generally had standing to sue in U.S. courts under the antitrust laws.<sup>73</sup> The Court reasoned that Congress did not intend to deny foreign purchasers a remedy when they are injured by antitrust violations that would give U.S. victims the right to sue, and further noted that permitting foreign plaintiffs to sue would enhance antitrust deterrence.<sup>74</sup>

*Pfizer* did not, however, address issues involving the extent to which federal courts could exercise jurisdiction over antitrust claims asserted by foreign plaintiffs. Congress attempted to resolve these issues by enacting the Foreign Trade Antitrust Improvements Act of 1982 (“FTAIA”).<sup>75</sup> The FTAIA purports to limit the jurisdictional reach of the Sherman Act in cases involving foreign commerce to situations where foreign commerce has a “direct, substantial, and reasonably foreseeable effect” on domestic commerce and “such effect gives rise to a claim” under the Sherman Act.<sup>76</sup>

For years, the FTAIA lay dormant. However, in the wake of the Justice Department’s aggressive prosecution of foreign cartels in the last decade, the statute has recently become the focus of attention. The enforcement actions brought by the Antitrust Division have generated significant follow-on private treble damages actions. In those private actions, a new class of plaintiff has emerged—foreign plaintiffs purporting to sue under the U.S. antitrust laws for injuries suffered abroad. Defendants have chal-

<sup>71</sup> See *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004); *Kruman v. Christie’s Int’l PLC*, 284 F.3d 384 (2d Cir. 2002).

<sup>72</sup> 434 U.S. 308 (1978).

<sup>73</sup> *Id.* at 313-15, 318-19.

<sup>74</sup> *Id.* at 315.

<sup>75</sup> 15 U.S.C. § 6a (2000).

<sup>76</sup> *Id.*

lenged such suits on the grounds that under the FTAIA, the courts lack subject matter jurisdiction.<sup>77</sup> The circuit courts split on the issue of whether, and the extent to which, the FTAIA bars claims on foreign transactions by foreign plaintiffs. The Fifth Circuit held that such claims are barred unless the plaintiff can show that the domestic anticompetitive effects caused by the illegal conduct give rise to its claim.<sup>78</sup> The Second<sup>79</sup> and D.C. Circuits<sup>80</sup> took a more generous approach to foreign claims and held that under the FTAIA, foreign plaintiffs may sue on a foreign transaction by showing merely that the conspiratorial conduct had the requisite effect on U.S. commerce, and that some person (not necessarily the foreign plaintiff) has a claim arising from the alleged conduct.<sup>81</sup>

The Supreme Court granted certiorari in *Empagran S.A.* in order to resolve the conflict among the circuits regarding the proper construction of the FTAIA.<sup>82</sup> On June 14, 2004, the Court ruled that the FTAIA barred foreign claimants from recovery under the United States' antitrust laws.<sup>83</sup> In reaching that conclusion, the Court took an unusual path. Rather than confronting the statutory interpretation issue head-on, the Court relied principally on the doctrine of prescriptive comity under which courts construe "ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations."<sup>84</sup> The Court reasoned that application of the United States' antitrust laws to claims by foreign citizens based on foreign transactions would create "a serious risk of interference with a foreign nation's ability independently to regulate its own commercial affairs," and that "the justification for that interference seems insubstantial."<sup>85</sup> In particular, the Court noted that permitting foreign plaintiffs to invoke the treble damages remedy under

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<sup>77</sup> See generally Edward D. Cavanagh, *The FTAIA and Subject Matter Jurisdiction Over Foreign Transactions Under the Antitrust Laws: The New Frontier in Antitrust Litigation*, 56 S.M.U. L. REV. 2151 (2003) (detailing federal courts' extraterritorial jurisdiction in light of the FTAIA).

<sup>78</sup> *Den Norske Stats Oljeselskap As v. Heeremac Vof*, 241 F.3d 420 (5th Cir. 2001), *cert. denied*, 534 U.S. 1127 (2002).

<sup>79</sup> See *Kruman v. Christie's Int'l PLC*, 284 F.3d 384 (2d Cir. 2002).

<sup>80</sup> *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 315 F.3d 338 (D.C. Cir. 2003), *vacated*, 124 S. Ct. 2359 (2004).

<sup>81</sup> *Id.* at 352.

<sup>82</sup> *F. Hoffmann-LaRoche, Ltd. v. Empagran S.A.*, 540 U.S. 1088 (2003).

<sup>83</sup> *Empagran S.A.*, 124 S. Ct. at 2366.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 2367.

U.S. law might supersede the national policy decisions of foreign governments and at the same time diminish the incentives of foreign firms to cooperate with the antitrust regulator in their home countries.<sup>86</sup>

In addition, the Court ruled that Congress did not intend to expand the scope of the Sherman Act as applied to foreign commerce when it enacted the FTAIA.<sup>87</sup> Neither the history nor the language of the FTAIA supports the expansive approach that was proposed by the plaintiffs.<sup>88</sup> Nor would pre-FTAIA caselaw support application of the Sherman Act to the conduct in question.<sup>89</sup> In so ruling, the Court elided over the complicated statutory interpretation question that had split the circuits.

The Court did, however, leave the courtroom door ajar, if not wide open, to those foreign plaintiffs who can show that their injury was “inextricably bound up with . . . domestic restraints of trade.”<sup>90</sup> Thus, the Court suggested that if the foreign plaintiff can show that the anticompetitive effects in the domestic market helped bring about the injury suffered by the plaintiffs abroad, then there is subject matter jurisdiction under the Sherman Act. Nevertheless, it still appears that the foreign plaintiff would have to establish that the alleged anticompetitive effect on domestic commerce gives rise to the claim that the foreign plaintiff asserts.

### *B. Enforcement of Foreign Antitrust Laws*

In the increasingly globalized economy of the twenty-first century, businesses must not only be concerned with the United States’ antitrust laws, but must also be concerned with the antitrust laws of other nations. For nearly a century, the United States was the most prominent, but by no means the only, cop on the antitrust beat. Today, largely due to the example set by the United States, over 100 nations have credible antitrust regimes in place.<sup>91</sup> Perhaps the regimes of Canada, the EU, Australia, and

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<sup>86</sup> *Id.* at 2368.

<sup>87</sup> *Id.* at 2369.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 2369-71.

<sup>90</sup> *Id.* at 2370.

<sup>91</sup> See R. Hewitt Pate, Assistant Attorney General Antitrust Division, The DOJ International Antitrust Program—Maintaining Momentum, Address Before the Antitrust Section of the American Bar Association 2003 Forum on International Competition Law (Feb. 6, 2003), available at <http://www.usdoj.gov/atr/public/speeches/200736.htm> (last visited June 10, 2005).

Japan are foremost among these, but virtually all “Westernized” economies now have some form of antitrust enforcement.

The ubiquitousness of antitrust enforcement on the global stage has had a profound effect on the business operations of international companies. General Electric and Honeywell were forced to abandon a merger, approved by U.S. authorities, when regulators in the EU objected to it on antitrust grounds.<sup>92</sup> Microsoft, having put the U.S. monopolization action behind it, was recently fined \$615 million for “abuse of dominance” by EU authorities for the same types of behavior that were the subject of the U.S. suit.<sup>93</sup> In addition, the EU imposed more restrictive conduct sanctions on Microsoft than had the U.S. courts.<sup>94</sup>

In sum, the globalization of antitrust has multiplied potential antitrust risks for international companies. The emergence of credible foreign antitrust regimes has led some antitrust critics to argue for a reexamination of the U.S. role in antitrust enforcement, and a scaling back of antitrust activity in the international arena by U.S. authorities.

## II

### WHAT’S WRONG WITH THIS PICTURE?

The United States’ antitrust enforcement apparatus is indeed formidable. Critics view the statutory scheme and the enforcement policies executing that scheme as too severe. They argue that criminal sanctions, which are felonies and may include fines of up to twice the unlawful gains to defendants or twice the losses suffered by the victims, as well as virtually guaranteed jail time for convicted individuals, may be unduly harsh.<sup>95</sup> Critics further

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<sup>92</sup> Commission Decision of 03/07/2001 declaring a concentration to be incompatible with the common market and the EEA Agreement (Case No COMP/M.2220 – General Electric/Honeywell) (July 3, 2001) [hereinafter Commission Decision of 03/07/2001].

<sup>93</sup> Commission Decision of 24.03.2004 relating to a proceeding under Article 82 of the EC Treaty (Case COMP/C-3/37.792 Microsoft) (Mar. 24, 2004) [hereinafter Commission Decision of 24.03.2004]; see Paul Meller, *EU Issues Strict New Ruling on Microsoft Record Fine Levied; Decision Could Shape How Business is Done*, INT’L HERALD TRIB. (Paris), Mar. 25, 2004, at 1.

<sup>94</sup> Meller, *supra* note 93.

<sup>95</sup> See Tefft W. Smith et al., *Finding the Right Price*, LEGAL TIMES, Dec. 15, 2003, at 32 (criticizing legislation raising fines under the Sherman Act in absence of attempts to reform sentencing guidelines); see also Steven J. Miller, Remarks Before the Antitrust Section of the American Bar Association Remedies Forum (Apr. 2, 2003) (expressing concern about a “pile on” mentality arising from civil treble dam-



argue that potential civil treble damages liability, without any right to contribution or claim reduction on top of already severe criminal sanctions, amounts to overkill.<sup>96</sup> Some question the continuing need for mandatory treble damages in the civil realm.<sup>97</sup> They urge that the threat of treble damages may chill behavior that is potentially procompetitive.<sup>98</sup> They also argue that mandatory trebling is inherently unfair because it makes businesses the targets of trivial suits that they are forced to settle rather than roll the dice with a jury; especially since in federal courts, with notice pleading, broad discovery, class actions, and liberal amendment policies, the cards are stacked against defendants.<sup>99</sup> The harshest detractors argue that antitrust is the outmoded creation of a smokestack society, and that in a fast-paced, high-tech economy antitrust serves only to stifle innovation, thereby impairing competition.<sup>100</sup>

While much of the criticism of the current antitrust enforcement scheme emanates from the defense side, would-be defendants are not the only critics of the system. Federal regulators have advocated legislation calling for enhanced criminal penalties, including higher fines under the Sherman Act and longer jail terms for those convicted of antitrust violations.<sup>101</sup> Consumers, especially in the wake of the *Microsoft* experience, are concerned that the equitable remedies in the antitrust arsenal are not sufficiently adaptable in today's economy to provide meaningful relief from monopolistic behavior.<sup>102</sup>

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ages on top of criminal double damages), available at [www.abanet.org/antitrust/remedies/roundtable1.doc](http://www.abanet.org/antitrust/remedies/roundtable1.doc) (last visited June 12, 2005).

<sup>96</sup> See generally Edward D. Cavanagh, *Detrebling Antitrust Damages: An Idea Whose Time Has Come?*, 61 TUL. L. REV. 777, 791-820 (1987) (detailing the criticisms of mandatory trebling).

<sup>97</sup> See Breit & Elzinga, *supra* note 5, at 405-06.

<sup>98</sup> See *id.* at 428-32; see also RICHARD A. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 231 (1976); Frank H. Easterbrook, *Detrebling Antitrust Damages*, 28 J.L. & ECON. 445, 456-57 (1985).

<sup>99</sup> See POSNER, *supra* note 98, at 228; see also PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 3306 (2d ed. 2000) ("[T]rebling encourages more marginal cases to be brought, and under more creative theories of liability.").

<sup>100</sup> See *Consumer Group Advises Congress Not to Ignore DOJ's Attempts to Stifle Innovation and Competition*, FREEDOMWORKS, Feb. 25, 1999, at 1 (expressing the view that the Justice Department's action against Microsoft is harming consumers by chilling innovation), available at [http://www.cse.org/newsroom/press\\_template.php?press\\_id=151](http://www.cse.org/newsroom/press_template.php?press_id=151) (last visited June 10, 2005).

<sup>101</sup> See Pate, *supra* note 4.

<sup>102</sup> See Lyle Denniston, *Judge Backs Microsoft Settlement*, BOSTON GLOBE, Nov.

Set forth below is an analysis of these concerns.

### A. *Criminal Enforcement*

#### 1. *Criminal Penalties*

As discussed above,<sup>103</sup> violations of the Sherman Act may be criminally prosecuted. Although government prosecutors have been circumspect in exercising criminal powers, criminal prosecution has historically played an important role in the Antitrust Division's enforcement policy. During the Reagan years, the Antitrust Division initiated criminal proceedings aggressively, and in heretofore unprecedented numbers, under the auspices of William Baxter.<sup>104</sup> Baxter's enforcement policies marked an abrupt departure from the policies of earlier administrations. Defendants prosecuted during his tenure were not the Fortune 500 companies that had been targeted by his predecessors, but rather small contractors or suppliers accused of bid-rigging in road building and government procurement contracts. Critics have charged that the Reagan-era Antitrust Division pursued criminal cases to the exclusion of civil enforcement.<sup>105</sup> While it would be inaccurate to say that there was no civil enforcement during the Reagan years, it is fair to say that civil enforcement was not a priority.

Subsequent administrations have pursued a more balanced docket as between civil and criminal cases,<sup>106</sup> but criminal enforcement remains the cornerstone of the Antitrust Division's enforcement policy.<sup>107</sup> With the advent of economic globalization, recent administrations have adopted a more international focus in pursuing their enforcement agenda.<sup>108</sup> As a result, the Antitrust Division in recent years has successfully prosecuted international cartels in auction services, food additives and vitamins, among others, and continues to devote significant resources to investigations involving price-fixing in the interna-

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2, 2002, at A1; Paul Roberts, *Consumer Groups Intervene in Microsoft Settlement*, INFOWORLD DAILY NEWS, Jan. 3, 2003, available at <http://www.infoworld.com/articles/hn/xml/03/01/03/030103hnintervene.html?s=IDGNS>.

<sup>103</sup> See *supra* notes 12-17 and accompanying text.

<sup>104</sup> See Kovacic, *supra* note 52, at 437-42.

<sup>105</sup> See Pitofsky, *supra* note 52, at 585.

<sup>106</sup> See *id.* at 585-86.

<sup>107</sup> See Pate, *supra* note 91 (describing how prosecuting international cartels criminally is a "core mission" of the Antitrust Division).

<sup>108</sup> *Id.*

tional arena.<sup>109</sup>

To enhance criminal enforcement, the Antitrust Division has supported recently enacted legislation that will (1) increase criminal fines under the Sherman Act, and (2) provide longer jail terms for those convicted of Sherman Act offenses.<sup>110</sup> The legislation will raise the statutory fine for corporations from \$10 million to \$100 million, increase the \$350,000 maximum for individuals to \$1 million, and increase the maximum jail sentence from up to three years to up to ten years.<sup>111</sup>

The rationale for increasing corporate fines under the Sherman Act is that the current maximum has not kept pace with the magnitude of contemporary antitrust price-fixing conspiracies.<sup>112</sup> In addition, higher penalties under the Sherman Act would provide the government with more flexibility at the sentencing phase of a case and relieve it of the substantial burden of proving the dollar amount of either twice the gain to the perpetrators or twice the loss to the victims of the antitrust violation.<sup>113</sup> In light of the global scope of recently prosecuted cartels, the increase in the statutory fine proposed seems modest and unobjectionable. Whether the increase will have the desired effect of enhancing deterrence is unclear.<sup>114</sup>

The rationale for increased jail time for convicted individuals is the same as that for increasing statutory fines for convicted corporations—the need for the sentence to reflect the magnitude of the wrongdoing. Moreover, proponents of increased jail time point out that the three-year maximum sentence for antitrust violations was among the shortest for white-collar crime, and is far less than the twenty-year maximum prescribed for white-collar

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<sup>109</sup> *Id.*

<sup>110</sup> Pub. L. No. 108-237, §§ 102-201, 118 Stat. 661, 661-670 (2004) (codified in scattered sections of 15 U.S.C.).

<sup>111</sup> *Id.* § 215, 118 Stat. at 668.

<sup>112</sup> See Pate, *supra* note 4, at 3.

<sup>113</sup> *Id.*

<sup>114</sup> See Donald C. Klawiter, *After the Deluge: The Powerful Effect of Substantial Criminal Fines, Imprisonment, and Other Penalties in the Age of International Cartel Enforcement*, 69 GEO. WASH. L. REV. 745, 758 n.79 (2001) (noting the absence of any consensus regarding “the impact of severe monetary penalties in deterring illegal conduct”); see also Michael L. Denger, Too Much or Too Little, Remarks before the Antitrust Section of the American Bar Association Remedies Forum, at 4-5 (Apr. 3, 2003) (questioning the deterrent effect of criminal fines because “most cartel participants don’t think they’ll get caught”), available at <http://www.abanet.org/antitrust/remedies/remediesintro.doc> (last visited June 14, 2005).

fraud under the Sarbanes-Oxley Act.<sup>115</sup> However, the case for more jail time is less persuasive. Although the Sherman Act has always carried criminal sanctions, jail time has not historically been imposed. Originally, criminal convictions under the Sherman Act carried only misdemeanor penalties which included a fine of up to \$5,000 and imprisonment for up to one year.<sup>116</sup> Jail time was almost unheard of until the 1960s when a number of executives in the *Electrical Equipment* cases were sentenced to thirty days in prison.<sup>117</sup> Still, it was not until the 1970s that jail time for antitrust violations became a common occurrence, largely because of two events. First, in 1974, Congress enacted the Antitrust Procedures and Penalties Act which amended the Sherman Act to make antitrust violations a felony punishable by up to three years of jail time.<sup>118</sup> Second, in 1977, the Antitrust Division promulgated Guidelines for Sentencing Recommendations in Felony Cases under the Sherman Act.<sup>119</sup> The Guidelines expressed the view that prison sentences for egregious restraints of trade are essential because they are uniquely effective in deterring antitrust violators (who generally are white-collar businessmen) who may view a fine as a “license fee” for fixing prices, but who view the threat of a substantial prison term more seriously.<sup>120</sup>

In succeeding years, the Antitrust Division has continued to press for mandatory jail time for Sherman Act offenders. The question is whether longer jail terms are needed. There is general agreement that the likelihood—indeed, the certainty—of some jail time, if an antitrust violator is apprehended and convicted, serves a valuable deterrent function. Less clear is whether deterrence is measurably increased by increasing jail time. Empirical research addressing this question is sparse. Real life experience casts doubt on the premise. Arguably, it is *prison* itself, not the *length* of the prison term, that creates the deterrent effect. More importantly, increasing the severity of jail sentences may discourage other nations from cooperative-enforcement ef-

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<sup>115</sup> See generally Klawiter, *supra* note 114, at 758 & n.79.

<sup>116</sup> 2 EARL W. KINTNER, FEDERAL ANTITRUST LAW § 9.5 (1980).

<sup>117</sup> MILTON HANDLER ET AL., TRADE REGULATION 51 (4th ed. 1997).

<sup>118</sup> Antitrust Penalties and Procedures Act, Pub. L. No. 93-528, 88 Stat. 1706 (1974) (codified in 15 U.S.C. § 16).

<sup>119</sup> U.S. Dep’t of Justice Antitrust Div., *Sentencing in Antitrust Felony Cases*, in 4 Trade Reg. Rep. (CCH) ¶ 13,115, at 20,649-23 (Aug. 16, 1994).

<sup>120</sup> See *id.* ¶ 13,115, at 20,649-24.

forts. Criminal sanctions for antitrust violations, while not unknown outside the United States, are rare. The existence of criminal sanctions had made some nations hesitant to assist the United States even before the new legislation. Increasing jail time is likely to further discourage assistance to the United States in the international arena.

## 2. *Leniency Program*

In 1978, under the aegis of John H. Shenefield, the Antitrust Division inaugurated a leniency program under which antitrust violators could escape criminal prosecution if they reported criminal activity to the Antitrust Division prior to the commencement of an investigation.<sup>121</sup> Any amnesty grant was discretionary with the Antitrust Division.<sup>122</sup> The purpose of the program was to reward entities who uncovered criminal activity for the Antitrust Division by not prosecuting them. While the program had some initial success, over time, it had fewer and fewer takers. In 1993, the leniency program was revised to make cooperation with the government easier and more inviting by: (1) making amnesty a matter of right if the conduct is reported prior to the commencement of any investigation; (2) permitting amnesty to be had even if cooperation begins after an investigation starts; and (3) protecting from prosecution all officers, directors, and employees of a company seeking amnesty, provided that they cooperate with authorities.<sup>123</sup>

The revised amnesty policy had a sudden and dramatic impact on antitrust enforcement. Amnesty applications surged and led directly to a series of criminal prosecutions that generated record fines.<sup>124</sup> Not surprisingly, the Antitrust Division views the Amnesty Program as a key element of its criminal enforcement policy.<sup>125</sup> So important is the Amnesty Program, that the Antitrust Division has taken steps to strengthen it by actively supporting recently enacted legislation that provides that parties who are granted amnesty and are subsequently sued in follow-on treble damages actions would be liable only for single damages, and

<sup>121</sup> U.S. Dep't of Justice Antitrust Div., *Prosecutorial Amnesty*—"Whistleblowing Conspirators," in 4 Trade Reg. Rep. (CCH) ¶ 13,112, at 20,649-21 (Aug. 16, 1994).

<sup>122</sup> *Id.*

<sup>123</sup> U.S. Dep't of Justice Antitrust Div., *supra* note 18, ¶ 13,113, at 20,629-21 to 20,629-22; Hammond, *supra* note 21.

<sup>124</sup> Hammond, *supra* note 21.

<sup>125</sup> *Id.*

only for the overcharges actually imposed; i.e., they would not be subject to joint and several liability.<sup>126</sup> This legislation was driven by the concern that the specter of treble damages in follow-on civil actions dissuades conspirators from cooperating with the government and availing themselves of the benefits of the Amnesty Program.

Unquestionably, the legislation strengthens the Amnesty Program by eliminating significant financial disincentives for participation by antitrust violators. Nevertheless, important questions remain as to whether this legislation: (1) is needed; and (2) will adversely impact private enforcement.

The need for this legislation is questionable. First, as is demonstrated by the large number of leniency applications, existing incentives to seek leniency are powerful and are working. Concerns that potential treble damages may discourage participation may well be overblown. Once the government has successfully prosecuted a criminal antitrust conspiracy, whether by trial or by plea agreement, the results in the civil realm are by and large preordained—defendants will be held liable and the only question is how much they will pay in damages. Given this reality, defendants will settle the follow-on civil actions. Those settlements tend to mirror *actual* damages, not *treble* damages. Moreover, the absence of a statutory right to contribution can be, and typically is, remedied by a sharing agreement among defendants. Accordingly, concerns that potential civil treble damage liability down the road chills participation in the leniency program appear more theoretical than real.

Second, the proposal may adversely affect private enforcement. As matters now stand, the criminal and civil phases of a conspiracy case proceed on separate tracks. The criminal action does not in any way foreclose the civil action, but may help the civil action if a conviction is obtained. The legislation would put significant limits on the monetary relief that private plaintiffs could obtain. The question is whether it is wise as a policy matter to permit discretionary prosecutorial decisions made by the Anti-trust Division to preempt, or at least limit, private remedies. One can argue that the restrictions placed on private actions by the legislation are limited and will not prevent private plaintiffs from obtaining full recovery from other defendants. Moreover,

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<sup>126</sup> Pub. L. No. 108-237, §§ 102-201, 118 Stat. 661, 661-670 (2004) (codified in scattered sections of 15 U.S.C.).

as previously noted, the civil cases are more likely to settle for an amount that approximates actual damages rather than treble damages. Still, altering the long-existing antitrust enforcement scheme to favor criminal over civil actions and government enforcement over private enforcement is disquieting. Fortunately, the bill contains a five-year sunset provision,<sup>127</sup> and, presumably, the law will not be renewed if there is a demonstrably negative effect on private enforcement during that five-year period.

## *B. Treble Damages*

### *1. Mandatory Trebling*

From their inception, the antitrust laws have provided for a private remedy that awarded successful plaintiffs mandatory treble damages.<sup>128</sup> The rationale for mandatory trebling is four-fold: (1) compensation; (2) deterrence; (3) punishment; and (4) disgorgement of ill-gotten gains.<sup>129</sup> Few would argue that compensation, deterrence, punishment, and disgorgement are proper goals of antitrust enforcement, but increasing numbers of critics are questioning whether mandatory trebling is essential to achieve these goals. The discussion below will examine the contemporary criticisms of mandatory trebling and discuss whether these criticisms call for elimination or modification of the current rule.

#### *a. Compensation*

From a compensation perspective, mandatory trebling serves to assure antitrust plaintiffs that they will fully recover any losses sustained by reason of any antitrust violations. Trebling is appropriate in horizontal conspiracy cases affecting price because the generally accepted measure of damages in those cases—overcharges, that is, the price actually paid less the price that would have prevailed but for the conspiracy—fails to measure the total harm suffered by the victims. For example, overcharges do not include lost opportunity costs. Nor do overcharges remunerate business entities for losses caused by diversion of company executives from their normal responsibilities and by other organizational disruptions necessitated by an antitrust suit.

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<sup>127</sup> § 211, 118 Stat. at 666.

<sup>128</sup> 15 U.S.C. § 15 (2000).

<sup>129</sup> See generally Cavanagh, *supra* note 96, at 786-88 (comparing the goals and effects of mandatory trebling).

More importantly, overcharges do not include the victim's share of the deadweight loss to society resulting from horizontal conspiracies. Trebling may also provide a rough approximation of actual damages in exclusion cases and group boycott cases, where lost profits are the accepted measure of damages, given that many illegal schemes so dislocate the market that it is nearly impossible to measure the true damages inflicted by the anticompetitive conduct. More than that, trebling provides plaintiffs with strong incentives to undertake the complex, lengthy, and expensive task of uncovering and successfully prosecuting antitrust violations. Finally, mandatory trebling may facilitate settlements in antitrust suits in amounts that roughly approximate actual damages.<sup>130</sup>

*b. Deterrence*

Mandatory trebling serves to deter antitrust violations. Whenever a prospective antitrust defendant is faced with a realistic likelihood of being forced to pay three times the actual damages that its risky conduct may cause, it will think twice about engaging in such conduct. The hard question is whether mandatory trebling provides the appropriate level of deterrence. From an economic perspective, the appropriate deterrent level turns on the likelihood that objectionable conduct will be detected.<sup>131</sup> Because many antitrust violations are concealed, including price-fixing, division of markets, and group boycotts, there is a reasonable likelihood that the offending conduct may go undetected. If the likelihood of being caught is one in two, then double damages provide the appropriate deterrent.<sup>132</sup> If the chances of successful prosecution are one in ten, then damages amounting to ten times the actual damages would be optimal from the economist's perspective. Mandatory trebling would thus be optimal when the chances of detection are one in three. Accordingly, mandatory trebling may *under-deter* in those cases where illegality is well concealed, which is frequently the case in horizontal price-fixing actions.<sup>133</sup> Put another way, the appropri-

<sup>130</sup> See generally Robert H. Lande, *Are Antitrust "Treble" Damages Really Single Damages?*, 54 OHIO ST. L.J. 115, 119 (1993) (noting that mandatory trebling often results in costs equal to the actual damages).

<sup>131</sup> See Easterbrook, *supra* note 98, at 454-58 (discussing the effects of concealability in trebling).

<sup>132</sup> *Id.* at 455.

<sup>133</sup> *Id.* at 455-56.



ate level of deterrence in horizontal price-fixing cases may be double or even triple treble damages.

On the other hand, critics argue that mandatory trebling *over* deters in those antitrust cases where damages are subject for allegedly unlawful conduct that is *not* concealed, such as tying, exclusive dealing, and monopolistic overcharges.<sup>134</sup> Critics assert that the consequence of mandatory trebling in these types of cases is to chill conduct that is procompetitive, and thus lawful, out of fear that this lawful behavior may be prosecuted and eventually punished. Nevertheless, it would be impracticable, if not impossible, to set damages multiples based on the likelihood that differing antitrust violations will be detected and successfully prosecuted. Accordingly, as is the case with compensation, trebling provides a kind of rough measure of the optimal level of deterrence in antitrust cases.

*c. Punishment*

Mandatory treble damages also serve to punish antitrust violators. Punishment occurs by definition whenever a defendant is ordered to pay an amount in excess of actual damages suffered by the plaintiff. Although few have historically questioned the punitive function of mandatory trebling, critics have recently argued that mandatory trebling may be unfairly punitive in cases where the private action is preceded by a criminal conviction and the defendant is fined under the alternative sentencing provisions in an amount equal to twice the gain derived from the illegal conduct or twice the loss incurred by the victim. As discussed below,<sup>135</sup> criminal fines under the Sherman Act have historically been low—until recently, a maximum of \$10 million for corporations and \$350,000 for individuals. The alternative sentencing procedures, enacted in 1984, gave the courts greater latitude in sentencing and dramatically increased the potential monetary penalties for criminal antitrust violations.<sup>136</sup> Nevertheless, piling civil treble damages on top of criminal double damages may be viewed as draconian and unnecessarily punitive.

*d. Disgorgement of Ill-Gotten Gains*

Finally, mandatory trebling assures that a defendant will not be

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<sup>134</sup> See Cavanagh, *supra* note 96, at 831-32.

<sup>135</sup> See *supra* notes 14-17 and accompanying text.

<sup>136</sup> 18 U.S.C. § 3571(d) (2000).

able to benefit monetarily from its wrongdoing.<sup>137</sup> Even if all of the victims of antitrust wrongdoing do not come forward to claim their rightful share of damages, antitrust violators are still denied the fruits of their bad conduct by virtue of the mandatory trebling rule. In theory, trebling is not necessary to assure disgorgement of ill-gotten gains because plaintiffs' *actual* claimed losses would presumably correspond to defendants' *actual* illicit gains. However, the reality is that plaintiffs are unlikely to undertake the arduous task of prosecuting a civil antitrust claim if their recovery is limited to actual damages. Without trebling, therefore, antitrust violators may not be sued and may well be able to reap the benefits of their illegal conduct.

On the other hand, mandatory trebling may again present a problem of overkill, at least in those cases where there has been a prior criminal conviction and defendants have been fined in the amount of twice the gain or twice the loss caused by their unlawful acts. If the criminal penalty itself assures disgorgement, query whether enhanced damages in subsequent civil actions are necessary or even desirable to assure further disgorgement.

## 2. *Is Mandatory Trebling Still Desirable?*

The foregoing discussion demonstrates that in the 115-year history of the antitrust laws sufficient doubt has been raised regarding the continuing viability of the four-prong rationale for mandatory trebling so as to warrant its reexamination.

As a threshold matter, it is clear that treble damages are not necessary in every civil antitrust case. For example, in cases where conduct is open, as opposed to covert, trebling is not necessary from a deterrence perspective in order to take account of those similar cases that may go undetected. In these cases, as with tort cases generally, recovery of actual damages should serve as a sufficient incentive to bring suit. Similarly, disgorgement could be achieved through an action for actual damages. Nor would punishment be appropriate if the alleged unlawful conduct were open rather than covert. On the other hand, mandatory trebling is still clearly appropriate in cases involving clandestine horizontal-price-fixing schemes because: (1) covert behavior is difficult to detect; (2) at least some covert schemes are likely to fly under the radar of even very vigilant enforcers;

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<sup>137</sup> *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 472-73 (1982) (explaining that a private remedy serves to deprive wrongdoers of their ill-gotten gains).

and (3) cartel behavior creates deadweight economic loss to society. Indeed, trebling may not achieve optimal deterrence if more than one in three price-fixing conspiracies go undetected. Trebling is also necessary in covert cases from a compensation perspective because conspiracies wreak havoc on the market and make it difficult to re-create how competitive forces would have interacted but for the conspiracy.

Given that trebling is not necessary in every case, but still a crucial element of certain types of antitrust cases, the question is whether the current treble damages scheme should be modified. At the outset, it should be noted that the current remedial scheme does not mandate treble damages in all cases because Congress has selectively chosen to detreble damages in certain cases. For example, antitrust liability arising out of joint research and production ventures, whose participants have notified the Antitrust Division of their existence, are subject only to actual damages in the event a violation is found.<sup>138</sup> Municipalities found to have violated the antitrust laws are not subject to damages but rather only to injunctive relief.<sup>139</sup> Legislation recently passed by Congress provides that parties participating in the Antitrust Division's Amnesty Program are liable only for actual damages.<sup>140</sup> In addition, that same legislation limits monetary relief against standard-setting organizations to actual damages.<sup>141</sup>

The discussion below will focus on whether it would be desirable to maintain the status quo or to adopt alternative approaches, including (a) detrebling in all antitrust cases, (b) selective detrebling, or (c) abolishing mandatory trebling but authorizing imposition of up to treble damages in the discretion of the court.

#### *a. Detrebling Across the Board*

Whatever the theoretical justification for elimination of treble damages across the board in antitrust cases, this approach is a non-starter as a practical matter. Given the long history of treble damages, coupled with the potentially devastating effect of cartel behavior on consumers, it would be political suicide for a legislator to advocate an end to trebling in antitrust cases. Moreover, the fact that cartels—even in the face of treble damages—still try

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<sup>138</sup> 15 U.S.C. § 4301 (2000).

<sup>139</sup> *See id.* §§ 34-36.

<sup>140</sup> Pub. L. No. 108-237, §§ 212-221, 118 Stat. 661, 666-69 (2004).

<sup>141</sup> *Id.* § 213, 118 Stat. at 666.

to get away with price-fixing strongly suggests that elimination of treble damages would wreak havoc on the deterrent function of antitrust. Advocates of this position are far outside the mainstream of antitrust thought. However, a proposal that would abolish treble damages but require prejudgment interest to be awarded in antitrust cases has received serious attention in antitrust circles.<sup>142</sup> Proponents argue that this approach would bring antitrust into the mainstream of tort law and would eliminate the worst features of mandatory trebling, namely, undeserved windfalls to plaintiffs and their attorneys and overdeterrence, while still preserving incentives to sue under the antitrust laws. Plaintiffs would be assured a recovery in excess of actual damages and in some cases the awards calculated on actual damages plus prejudgment interest would exceed treble damages. Defendants facing potential liability for prejudgment interest would have strong incentives to enter into meaningful settlement negotiations earlier, rather than later, in the litigation.

While this approach, particularly its party-neutral aspect, is intriguing, substituting prejudgment interest for trebling does not offer a clear improvement over the present system. First, calculation of prejudgment interest would be enormously complicated, far more complicated than simple trebling. For this reason alone, a prejudgment interest rule in lieu of treble damages could also lengthen proceedings and make antitrust litigation more costly. Second, use of prejudgment interest would create greater uncertainty as to ultimate liability in dollars, while trebling provides much greater certainty. Moreover, to the extent that this proposal would generate greater dollar recoveries for plaintiffs than those available under mandatory trebling, overdeterrence remains an issue. Third, as a corollary to point two, increased uncertainty may impair the parties' abilities to reach a settlement. Fourth, substituting a rate or rates of interest for trebling would appear no less arbitrary than the present system of mandatory trebling. At the end of the day, the prejudgment interest approach does not provide a clear improvement over the present system.

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<sup>142</sup> The prejudgment interest issue has been debated at length by the ABA Antitrust Section Civil Remedies Task Force.

*b. Selective Detrebling*

As discussed above,<sup>143</sup> Congress has already engaged in selective detrebling and may continue to do so. The question for discussion here is whether a piecemeal approach to detrebling is preferable to a comprehensive policy on detrebling. As a general rule, comprehensive policies are preferable to those adopted piecemeal. This is particularly true in antitrust, especially since Congress has detrebled certain conduct and will now face significant lobbying from additional groups seeking immunity from mandatory trebling.

Yet, designing a comprehensive detrebling policy is easier said than done. Especially difficult is the question of where to draw the line between trebling and actual damages. One approach is to allow treble damages in *per se* cases but not in non-*per se* cases.<sup>144</sup> The underlying rationale of this view—that trebling should be reserved for egregious cases—is sound. However, practical application of such a rule would be difficult because there is no sharp divide between *per se* and non-*per se* cases.<sup>145</sup> Indeed, it appears from the line of Supreme Court cases culminating in *California Dental Ass’n* that the dividing line is in a state of flux.<sup>146</sup> Accordingly, making treble damages turn on whether the defendants’ acts are *per se* illegal is likely to generate more confusion than certainty. Moreover, the *per se*/non-*per se* distinction is troublesome on the merits because substantial harm to competition can result from conduct that is traditionally viewed as falling on the “Rule of Reason” side of the liability spectrum.<sup>147</sup>

A second approach would reserve trebling for conduct that is covert and detreble allegedly unlawful conduct that is open and notorious.<sup>148</sup> The rationale for this view is that where unlawful conduct is concealed, which is typically the case where price-fixing is involved, the unlawful conduct is not certain to be discovered and successfully prosecuted.<sup>149</sup> The subsidy of treble

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<sup>143</sup> See *supra* notes 138-41 and accompanying text.

<sup>144</sup> See generally Cavanagh, *supra* note 96, at 824-29 (discussing the reasoning behind the *per se* distinction in trebling).

<sup>145</sup> See *id.* at 826-27.

<sup>146</sup> See *Cal. Dental Ass’n v. Fed. Trade Comm’n*, 526 U.S. 756, 769-79 (1999).

<sup>147</sup> See Cavanagh, *supra* note 96, at 824-29.

<sup>148</sup> See Easterbrook, *supra* note 98, at 454-58 (discussing concealability as a proper foundation for trebling).

<sup>149</sup> *Id.*

damages encourages antitrust victims to ferret out and prosecute covert illegal conduct. Trebling also provides significant incentives for prospective antitrust violators to refrain from their illegal conduct. At the same time, where the acts in question are open and not concealed, the incentives provided by mandatory trebling are arguably unnecessary. Detection and successful prosecution of such open conduct is far more likely than in the case of covert activity, and the near certainty of being caught would be ample incentive for the antitrust violator to refrain from illegal conduct. Equally important, the cost of detection is minimal where conduct is not concealed. Accordingly, trebling is less justifiable in the case of overt, as opposed to covert, acts.

As with the first option, this second approach suffers from lack of certainty and predictability. Unlawful antitrust schemes typically involve a mix of overt and covert activities. Bid-rigging is a prime example of this phenomenon. Courts should not let price fixers off the hook for treble damages by permitting them to argue that their activities were open. The courts have long rejected attempts by defendants to defeat antitrust liability through proof that the Antitrust Division or other government agencies were aware of the alleged conduct and did not take immediate steps to challenge that conduct.<sup>150</sup> Moreover, actual damages may not provide an accurate measure of the economic harm caused by antitrust violations that are open and notorious. Conspiratorial behaviors, particularly conspiracies affecting price, not only force victims to pay overcharges but also create a deadweight loss to society for which the victims are not directly compensated. Permitting antitrust violators to avoid treble damages by the simple expediency of “going public” with their behavior is unsound because limiting plaintiffs to actual damages would exclude losses due to allocable inefficiency resulting from defendants’ conduct.

A third approach would permit treble damages where prior criminal actions by the government have been successfully prosecuted. This approach is beneficial in that it would assure that trebling would occur only in cases involving truly egregious conduct. On the downside, this approach may prove to be underinclusive and may end up excluding cases where treble damages

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<sup>150</sup> See, e.g., *American Column & Lumber Co. v. United States*, 257 U.S. 377, 411 (1921) (demonstrating how a trade association’s forwarding of information gathered in its data sharing program to the Department of Justice does not immunize the conduct).

would be appropriate. The criminal remedy is discretionary with the Antitrust Division. If the government declines to proceed in a case or prosecutes a case civilly, private litigants would be denied the treble damages remedy, even in cases where the conduct is arguably egregious. Thus, the Antitrust Division's exercise of prosecutorial discretion would have a preemptive effect on remedies available to the private bar.

This third approach is also troublesome from another perspective. As discussed above,<sup>151</sup> a major criticism of antitrust remedies has been the potential catastrophic effect of piling civil treble damages on top of criminal fines that are based on twice the loss to victims or twice the gain to antitrust violators. If that criticism is valid, it would be totally undetermined by a remedies scheme that would allow trebling only where there has been a prior criminal conviction. Indeed, that criticism suggests that damages in civil follow-on litigation should be detrebled. Equally important, given the benefits that inure to private litigants in the wake of a successful criminal antitrust prosecution, including collateral estoppel and admission of guilty pleas into evidence, it is questionable whether trebling is a necessary incentive for a private follow-on action.

A fourth avenue would be to detreble in those cases where the defendant has no reason to believe that its conduct is illegal.<sup>152</sup> The justification here is that trebling is unduly harsh in cases of first impression, as well as in cases where (1) liability is based on a change in prior law upon which a defendant has relied; (2) liability is found, notwithstanding judicial authority in other jurisdictions finding the conduct lawful; and (3) liability is predicated on a novel theory.<sup>153</sup>

The Achilles' heel of this approach is the difficulty and the cost of formulating meaningful objective standards for liability.<sup>154</sup> It is conceivable that in nearly every antitrust case a defendant would seek to characterize the liability theories as novel or as matters of first impression. While intriguing, this proposal does not appear to offer significant improvement over the present system.

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<sup>151</sup> See *supra* note 95 and accompanying text.

<sup>152</sup> See, e.g., New York State Bar Association, *Report of Antitrust Section Committee on Legislation*, 54 N.Y. ST. B.J. 395, 396 (Oct. 1982).

<sup>153</sup> See Cavanagh, *supra* note 96, at 830-31.

<sup>154</sup> *Id.*

*c. Discretionary Detrebling*

None of the foregoing proposals for selective detrebling is ideal. Each brings its own baggage. An alternative to selective detrebling would be to abolish *mandatory* treble damages but to permit courts in the exercise of their sound discretion to award up to treble the amount of actual damages.<sup>155</sup> The rationale underlying discretionary trebling is to eliminate the perceived harshness and arbitrariness of mandatory trebling and to permit courts to more effectively tailor civil remedies to the wrongs committed. The Antitrust and Trade Regulation Committee of the Association of the Bar of the City of New York has proposed that in exercising discretion, the courts should take into account: (1) the willfulness of the violation; (2) whether a reasonably well-informed person should have known that the conduct was illegal; (3) whether the illegal restraint gave rise to some societal benefit or whether it was the kind of naked restraint of trade which has traditionally been condemned by the *per se* rule; (4) the length of time the illegal acts were committed; (5) whether the conduct was engaged in openly or whether efforts were made to keep the conduct secret; (6) the scope of the illegal activity; (7) the benefits derived by the defendants from the illegal activity; and (8) the impact of increased damages on the defendant's business.<sup>156</sup>

The strongest case for trebling on a discretionary basis would be against defendants involved in a long-term clandestine conspiracy affecting price and impacting a broad segment of the economy, where the defendants have adequate funds to pay enhanced damages and a prior history of antitrust violations. The case for trebling grows progressively weaker to the extent that the conduct falls outside the traditionally narrow *per se* category and generates tangible economic benefits to consumers.

The discretionary approach is not without a significant potential downside. First, under a discretionary regime, trebling itself will become an issue in every case. Courts will have to consider additional proof, including expert proof, much of which is likely to be tested by preclusive *Daubert* motions.<sup>157</sup> Antitrust cases

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<sup>155</sup> See *id.* at 838-41.

<sup>156</sup> *Id.* at 838-39 (citing Antitrust & Trade Regulation Comm'n of the Ass'n of the Bar of the City of New York, *Report on Treble Damages*, 40 THE REC. 647, 669-70 (1985)).

<sup>157</sup> *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993) (requiring the trial court to act as gatekeeper to separate out probative expert evidence from junk science).



will become even more costly, lengthy, and complicated. In short, damages issues will become the principal focus of the antitrust action, which is precisely opposite the current state of affairs. Recognizing that antitrust violations may so dislocate the marketplace as to make damages difficult to prove, courts have historically afforded plaintiffs leeway in proving damages, allowing for reasonable estimates once liability has been established.<sup>158</sup> A rule of discretionary trebling may result in the tail of damages wagging the dog of antitrust liability.

Second, discretionary trebling will make it more difficult for the parties to predict damages with any degree of certainty. In turn, uncertainty in assessing damages hinders attempts to reach settlements. Thus, a rule of discretionary trebling could lead to more, not fewer, antitrust trials.

Third, by entrusting the trebling decision to the sound discretion of the court, there is a danger that damages decisions may turn on individual judges' subjective attitudes toward antitrust cases, not on the merits of the particular claims before the court. Federal judges undergo an arduous screening process prior to confirmation to a post which provides lifetime tenure in good conduct. The process is designed to assure the appointment of jurists with good judgment. Still, the human factor cannot be ignored.

Equally important, precisely because judges will be deciding antitrust issues on a case-by-case basis, it is likely that, at least initially, there will be significant variation in the decisions on trebling issues. It may take years to forge a consensus on these issues as the cases percolate up through the appellate process. In the meantime, the parties will face uncertainty on significant damages issues.

Finally, merely vesting courts with discretionary powers does not guarantee that those powers will be exercised. In the tort area, there has been much criticism of what many view as excessive awards to plaintiffs in personal injury cases. That criticism has given rise to a tort reform movement advocating for damage caps in such cases.<sup>159</sup> However, judges at both the federal and

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<sup>158</sup> See, e.g., *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 561 (1931) ("[W]hile the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate.").

<sup>159</sup> See, e.g., JOINT ECON. COMM'N STUDY, IMPROVING THE AMERICAN LEGAL

state levels have broad power of remittitur to reduce excessive jury verdicts. Were the courts diligently to exercise the power of remittitur, there would be no need for “tort reform.” The simple fact is that courts are reluctant to limit jury verdicts. A similar risk exists in antitrust cases under discretionary trebling. Judges may simply be content to enter judgment on verdicts awarding actual damages without giving further consideration to factors that would support trebling. All the potential benefits of discretionary trebling would be lost if the courts decline to utilize their powers.

In the final analysis, discretionary trebling introduces an array of issues that are not present under current law, raising the possibility that the cure may be worse than the ill. The case for eliminating mandatory trebling has not been made.

### C. *Equitable Remedies*

In the equitable realm, there is good news and bad news. The good news is in the area of merger enforcement, where the Anti-trust Division and the FTC have screened tens of thousands of mergers, approving the overwhelming majority. But where a given merger threatens competition, the agencies have used the consent decree process to eliminate anticompetitive aspects of the deal while permitting the underlying transaction to move forward. Where settlements could not be reached, the agencies have sued to enjoin mergers that they view as anticompetitive.<sup>160</sup> In the rare instances where the merging parties have declined to make the premerger notifications requested by the agencies, the government has gone to court to impose sanctions.

The bad news stems from the use of equitable remedies to alleviate the anticompetitive effects caused by monopolization. As *Microsoft*<sup>161</sup> illustrates, application of traditional equitable remedies to fast-paced, high-tech industries is no easy task. Critics of antitrust have suggested that antitrust principles may no longer be relevant in the twenty-first-century marketplace.<sup>162</sup> That position is extreme. Still, the fact that the Supreme Court has not

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SYSTEM: THE ECONOMIC BENEFITS OF TORT REFORM (1996), available at <http://www.house.gov/jec/tort/tort/tort.htm> (last visited June 15, 2005).

<sup>160</sup> See *Fed. Trade Comm’n v. H.J. Heinz Co.*, 246 F.3d 708 (D.C. Cir. 2001); *Fed. Trade Comm’n v. Staples, Inc.*, 970 F. Supp. 1066 (D.D.C. 1997).

<sup>161</sup> *United States v. Microsoft Corp.*, 97 F. Supp. 2d 59 (D.D.C. 2000), *aff’d in part, rev’d in part*, 253 F.3d 34 (D.C. Cir. 2001), and *cert. denied*, 534 U.S. 952 (2001).

<sup>162</sup> See *infra* note 176 and accompanying text.

ordered dissolution of a company in nearly forty years underscores the need to reexamine equitable relief in monopolization cases.

### *1. Mergers*

The enactment of the HSR legislation in 1976,<sup>163</sup> coupled with the promulgation of the Justice Department's Merger Guidelines in 1982, revolutionized merger practice. As a result of these two events: (a) the government received notification of contemplated mergers of any significant size prior to consummation; (b) the process for analyzing mergers became more transparent and the results more predictable for parties to the merger; (c) the vast majority of transactions have been cleared by the government; (d) disputes have been resolved administratively through consent decrees in those cases where anticompetitive potential existed; and (e) litigation has been infrequent and a tool of last resort.

#### *a. Premerger Notification*

The HSR premerger filing requirements and thirty-day notice period afford the government an opportunity to analyze the potential anticompetitive effects of a merger prior to its consummation.<sup>164</sup> If the transaction as a whole raises anticompetitive concerns, the government can challenge it in court before the parties incur the considerable costs of integration. If the transaction is objectionable in part, the government can identify steps that would remedy potential anticompetitive effects—typically, sale of identified assets to third parties—and permit the underlying transaction to go through after the parties have addressed the government's objections. Thus, the HSR scheme provides the government significant flexibility in regulating mergers but also allows mergers to be consummated without significant risk of litigation after the fact.

Prior to the HSR, the government's options in merger control were limited. Premerger filings were not required, and there was no mandatory waiting period. Proposed mergers could be enjoined only if the government got wind of the transactions prior to consummation, which was typically not the case. Accordingly, the only viable option for the government was to sue to “unbend the pretzel” after the merger had been completed. Unquestiona-

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<sup>163</sup> See *supra* notes 25-29 and accompanying text.

<sup>164</sup> 15 U.S.C. § 18a (2000).

bly, the HSR has markedly improved merger oversight both from an enforcement and a business perspective.

*b. The Merger Guidelines—Transparency*

The 1982 Merger Guidelines provide a detailed roadmap specifying how antitrust enforcement agencies will analyze mergers.<sup>165</sup> This transparency of process minimizes uncertainty and enables the parties better to gauge the legal risks of a merger transaction. Transparency of process also promotes consistency of outcomes, which also serves to minimize business risk. Greater predictability and reduction of risk serve to create a hospitable atmosphere for commercial interactions.

*c. The Merger Guidelines—Revival of Merger Activity*

In the 1960s, a series of Supreme Court merger rulings culminating in the 1966 *Von's Grocery*<sup>166</sup> decision severely restricted merger activity. Indeed, in the aftermath of *Von's Grocery*, where the Court struck down a merger market share that amounted to less than eight percent of the relevant market,<sup>167</sup> horizontal mergers came to be viewed as virtually per se unlawful. The restrictive approach of *Von's Grocery* was codified in the Antitrust Division's 1968 Merger Guidelines,<sup>168</sup> and merger activity between rivals virtually disappeared. Although the 1968 Guidelines soon withered on the vine, merger activity remained in the doldrums throughout the 1970s. It was not until the promulgation of the 1982 Merger Guidelines that merger transactions were revived. Departing from the earlier version of the Guidelines and, more importantly, from existing case law precedent, the 1982 Guidelines were rooted in the view that merger activity was generally healthy and should be of concern only where mergers would enhance market power and lead to higher prices and lower output.<sup>169</sup>

This more hospitable regulatory approach to mergers, combined with favorable economic conditions in the mid-1980s, led to a surge in mergers that continued into the 1990s and peaked with the high-tech boom in the latter half of that decade. With

<sup>165</sup> U.S. Dep't of Justice Antitrust Div., *supra* note 54.

<sup>166</sup> *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966).

<sup>167</sup> *Id.* at 277-78.

<sup>168</sup> U.S. Dep't of Justice Antitrust Div., *Merger Guidelines—1968*, in 4 Trade Reg. Rep. (CCH) ¶ 13,101, at 20,521 (Mar. 18, 1998).

<sup>169</sup> See U.S. Dep't of Justice Antitrust Div., *supra* note 54, ¶ 13,102, at 20,528-29.

the HSR prenotification requirements in place, the Antitrust Division and the FTC were able to clear or restructure the overwhelming majority of mergers. Where the government announced that it would contest transactions, some mergers simply folded;<sup>170</sup> others were litigated.<sup>171</sup> But for the HSR prenotification requirements and the Merger Guidelines, it is unlikely that the volume of merger activities in the past two decades could have been sustained.

*d. Administrative Resolution*

Administrative resolution of antitrust issues in merger transactions is a key element of modern merger enforcement policy. Resolution of merger issues at the agency level, as opposed to in the courts, has served to limit costs and reduce delays associated with merger transactions. Had the courts been the only arbiters of mergers, the transactional volume over the last two decades could not possibly have been sustained.

*e. Reduction in Litigation*

The administrative approach to merger enforcement has minimized, but not eliminated, the need for litigation in merger enforcement. Litigation remains a weapon of last resort. Still, the administrative model is not without its downside. Given the relatively few merger cases that have been litigated in the past twenty years, merger law (as opposed to merger *practice*) has stagnated. The vast majority of judicial precedent in the merger area, which developed in the 1950s and 1960s, is largely irrelevant to merger practice today, yet has never been overruled by the courts. The Supreme Court decided the last substantive merger case under section 7 of the Clayton Act, in *General Dynamics*, which was over thirty years ago.<sup>172</sup>

Given the paucity of case law, courts facing merger issues today have little useful case authority upon which to rely. The obvious downside of taking the bulk of the merger enforcement out

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<sup>170</sup> See James Bernstein, *Takeover Talk Good Medicine for Genovese's Stock Price*, *NEWSDAY*, Sept. 7, 1996, at A21 (describing how Rite-Aide abandoned its plans to buy Revco in 1996 after the FTC questioned the merger).

<sup>171</sup> *E.g.*, *Fed. Trade Comm'n v. H.J. Heinz Co.*, 246 F.3d 708 (D.C. Cir. 2001) (blocking merger between Heinz and Beech-Nut); *Fed. Trade Comm'n v. Staples, Inc.*, 970 F. Supp. 1066 (D.D.C. 1997) (enjoining merger between superstore giants Staples and Office Depot).

<sup>172</sup> *United States v. Gen. Dynamics Corp.*, 415 U.S. 486 (1974).

of the courts has been to deny the federal judges who hear the few merger cases that do make it to court the benefits of the common law system: cases percolate through the system, consensus is reached, precedents emerge, and the law is established.<sup>173</sup> It would be both desirable and beneficial for the enforcement agencies to litigate a greater number of merger cases in the courts.<sup>174</sup>

On balance, however, the present system of merger enforcement has worked well.

## 2. *Equitable Remedies—Monopolization*

In the wake of the *Microsoft* decision, the issue of equitable remedies in monopolization cases has become a hot topic of discussion, not only among antitrust lawyers, but also among the public at large. Unfortunately, the law with respect to equitable remedies in monopolization is not well-developed; a review of the antitrust case law and literature will bear this out. This is somewhat surprising, since it was the invocation of equitable remedies—specifically, the breakup of Standard Oil<sup>175</sup> and American Tobacco<sup>176</sup> during the heady trust-busting days of the Roosevelt and Taft Administrations—that put antitrust on the map nearly a century ago. This is not to say that the issue of equitable remedies has not arisen in monopolization cases since *Standard Oil*. On the contrary, issues of remedy loomed large in the *United Shoe Machinery* case,<sup>177</sup> the *AT&T* settlement that broke up “the phone company,”<sup>178</sup> and, of course, the recent *Microsoft* settlement.<sup>179</sup> Still, the last court-ordered divestiture in a monopolization case occurred in *Grinnell* in 1966.<sup>180</sup> Case law on divestiture in monopolization cases since that time is virtually nonexistent. Accordingly, neither the courts nor the litigants have had much judicial guidance concerning the

<sup>173</sup> Stephen Calkins, *In Praise of Antitrust Litigation*, 72 ST. JOHN'S L. REV. 1, 1-8 (1998).

<sup>174</sup> See *id.*

<sup>175</sup> *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

<sup>176</sup> *United States v. Am. Tobacco Co.*, 221 U.S. 106 (1911).

<sup>177</sup> *United States v. United Shoe Mach. Corp.*, 391 U.S. 244 (1968).

<sup>178</sup> *United States v. Am. Tel. & Tel. Corp.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

<sup>179</sup> *United States v. Microsoft Corp.*, 231 F. Supp. 2d 144 (D.D.C. 2002) (opinion and order approving consent decree), *aff'd sub nom.*, *Massachusetts v. Microsoft Corp.*, 373 F.3d 1199 (D.C. Cir. 2004).

<sup>180</sup> *United States v. Grinnell Corp.*, 384 U.S. 563 (1966).

appropriate legal standards governing the disposition in recent monopolization cases, including *Microsoft*.

From the outset, the *Microsoft* case proceeded under a cloud of uncertainty with respect to the standards governing remedies in monopolization cases. That fact may explain why the Antitrust Division did not propose divestiture until near the very end of trial. The dearth of judicial guidance on monopolization remedy may also explain why the reactions to Judge Jackson's initial divestiture order in *Microsoft*, its subsequent vacatur by the D.C. Circuit, and the final settlement have been largely visceral rather than the products of thoughtful legal and economic analysis.

The remainder of Part II will examine and compare equitable remedies in monopolization cases. As a threshold matter, Section II.C.2 will (a) discuss the continuing relevance of antitrust principles to high-tech markets and (b) review the costs and benefits of various forms of equitable relief. The discussion will then explore how equitable remedies have been applied in the past, including the *Microsoft* case, in Section II.D; propose some guidelines for determining the appropriate equitable remedy in Section II.E; and review the interrelationship between equitable relief and other antitrust remedies, including deregulation, in Section II.F.

#### a. Antitrust and High-Tech Markets

Throughout the pendency of the *Microsoft* case, many questioned whether the century-old Sherman Act, signed into law in an era when heavy industry and capital investment were the driving forces in the economy, is still relevant in the new millennium—in a mature economy, based on human capital and information technology, and driven largely by high-tech companies.<sup>181</sup> Those who contend that antitrust is outmoded would argue that technology is eradicating imperfections in market economies.<sup>182</sup> The new economy has smoothed out business cy-

<sup>181</sup> See Appellate Brief for Microsoft Corp. at 16-19, 88-92, 133, *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001); Christian Ahlborn et al., *Competition Policy in the New Economy: Is European Competition Law Up to the Challenge*, 2001 EUR. COMPETITION L. REV. 22(5), at 156-67 (2001); DAVID S. EVANS & RICHARD SCHMALENSEE, SOME ECONOMIC ASPECTS OF ANTITRUST ANALYSIS IN DYNAMICALLY COMPETITIVE INDUSTRIES (Nat'l Bureau of Econ. Research, Working Paper No. 8268) (2001). But see Jonathan M. Jacobson, *Do We Need A "New Economy" Exception For Antitrust?*, 16 ANTITRUST A.B.A. 89 (Fall 2001) (arguing against any "new economy" exception in monopolization cases).

<sup>182</sup> Lester C. Thurow, *Let's Abolish the Antitrust Laws*, N.Y. TIMES, Oct. 19, 1980,

cles and made it more difficult for sellers to raise prices and lower output. The accelerating pace of technological change creates continuous opportunities to challenge established leaders in various industries. No market leader is safe from competitive initiatives and entrenchment is virtually impossible. Microsoft and other industry leaders must innovate, for unless they offer new and better products, rivals will leave them in the dust. Antitrust is therefore redundant in self-correcting high-tech markets, and its use would serve only to chill innovation and slow economic development.

There is certainly a grain of truth in this argument. No one would seriously argue with the proposition that high-tech markets *are* different from smokestack industries in significant ways. Rapid innovation has created shorter product cycles. Word Star and MTST machines, once hot products, have come and gone in a flash. Today's ever-changing marketplace makes it harder for a firm to obtain dominance in a product. Still, achieving dominance is not impossible, as the Windows experience amply demonstrates. In fact, the changes wrought by the high-tech economy cut both ways on the question of antitrust. While it is true that the rapid-innovation characteristic of the high-tech economy is a major hurdle to creating and sustaining monopoly power, it is also true that the high-tech marketplace may in some ways be more susceptible to antitrust problems than old-fashioned manufacturing markets. Specifically, high-tech markets may experience antitrust problems because of the phenomenon of network externalities.<sup>183</sup> Network externalities lead to entrenchment, even in the face of innovation.<sup>184</sup>

Indeed, network externalities may entrench the Microsofts of the world even deeper as newer and cheaper technologies enter the market. First, the new networks face significant hurdles in attracting a critical mass of buyers and suppliers. Buyers and suppliers are more inclined to stick with the incumbent network

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§ 3, at 2; *see also* LESTER C. THUROW, *THE ZERO-SUM SOCIETY: DISTRIBUTION AND THE POSSIBILITIES FOR ECONOMIC CHANGE* 145 (1980) (noting modern technologies' role in economic change). *See generally* Spencer Weber Waller, *The Modern Antitrust Relevance of Oliver Wendell Holmes*, 59 *BROOK. L. REV.* 1443, 1464-68 (1994) (explaining the importance of modern technologies in antitrust).

<sup>183</sup> *See* R. Craig Romaine & Steven C. Salop, *Slap Their Wrists? Tie Their Hands? Slice Them Into Pieces? Alternative Remedies For Monopolization in the Microsoft Case*, 13 *ANTITRUST A.B.A.* 15, 17-18 (Summer 1999).

<sup>184</sup> *See id.* at 17-18, 23.



and face significant economic disincentives to join a new network. In the face of high switching costs, they may be locked into the old network. Second, the incumbent network may compete aggressively to retain its installed base through price competition, promotions, or product variation. Unless the incumbent network is developing better or less expensive products, the short-run benefits of network externalities may result in a long-run detriment to consumers by depriving them of newer and better technologies.

The argument that 115 years of antitrust jurisprudence should be so jettisoned in cases involving high-tech markets because those markets change fast and the antitrust enforcement apparatus is just too slow brings with it a heavy burden of persuasion. Antitrust critics have simply not made the case for the proposition that antitrust is irrelevant to the high-tech marketplace of the twenty-first century. The argument that high-tech markets are self-correcting is to a great extent just old wine in new bottles. Throughout its history, antitrust has been a whipping boy. Professor McGee, in an effort to rewrite history, has urged that Standard Oil be remembered for its benevolence rather than its predatory behavior.<sup>185</sup> As discussed more fully below,<sup>186</sup> antitrust enforcers were derided for pressing monopolization claims against IBM in the 1960s and AT&T in 1970s. In the 1970s and 1980s, when some observers saw the United States as a distinct second to Japan in technological development, antitrust was again the culprit. Legislation was enacted to limit the reach of the antitrust laws in cases involving foreign commerce.<sup>187</sup> The late Malcolm Baldrige, Secretary of Commerce under President Reagan, went so far as to advocate the repeal of Section 7 of the Clayton Act after certain mergers in the oil industry came under regulatory scrutiny.<sup>188</sup>

Far from being outdated, antitrust continues to be relevant as a tool for assuring free markets and access to free markets, which, in turn, fosters innovation and provides consumers with the highest quality goods and services at the lowest prices. Perhaps, antitrust has never been more relevant. An enduring quality of

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<sup>185</sup> John S. McGee, *Predatory Price Cutting: The Standard Oil (N.J.) Case*, 1 J.L. & ECON. 137, 137-38 (1958).

<sup>186</sup> See *infra* note 249 and accompanying text.

<sup>187</sup> Foreign Trade Antitrust Improvements Act, 15 U.S.C. § 6a (2000).

<sup>188</sup> See Baldrige *Proposes Repeal of Antitrust Language, Olmer Japan Trip is Cancelled*, in 2 Int'l Trade Rep. (BNA), at 284 (Feb. 27, 1985).

antitrust law has been its adaptability to changing economic scenery. Technology may impact the way that we view antitrust issues, but it does not eliminate the need for antitrust law. Moreover, even if one were to accept the view that antitrust should play a reduced role, or no role, in the new economy, that concession would still be unavailing to high-tech firms. *Microsoft* was not about the new economy but rather about old-fashioned monopolistic exclusion in the high-tech context. Monopolistic exclusion has always been unlawful under the antitrust laws, and a monopolist cannot receive a free pass simply because it deals in high-tech products.

*b. Equitable Remedies: Conduct and Structural Relief Compared*

Post-judgment remedies fall into two broad categories: conduct remedies and structural remedies. Economist F.M. Scherer once likened conduct remedies to drug therapy and structural remedies to surgery.<sup>189</sup> That analogy is apt. Conduct remedies are less invasive and may take some time to work. Structural remedies are radical but may cure the problem right away. Keep in mind, however, that the filing of a lawsuit itself may have an impact on a defendant's conduct. A lawsuit alone may chill the vigor with which a defendant pursues various buying and selling strategies challenged by the government, or deter similar conduct in the future. There is some evidence that Microsoft may have backed down on compliance with certain contractual demands during the pendency of the government action.<sup>190</sup>

*(i) Conduct Remedies*

Conduct remedies are the most frequently invoked by the courts in monopolization cases. As a former head of the Anti-trust Division has stated: "An antitrust remedy for a Section 2 violation must stop the offending conduct, prevent its recurrence, and restore competition."<sup>191</sup> Accordingly, conduct remedies may affect an entire range of a firm's business activities. Thus, a con-

<sup>189</sup> Romaine & Salop, *supra* note 183, at 17.

<sup>190</sup> See Joseph Nocera, *Google This: Is Microsoft Still a Bully?*, N.Y. TIMES, May 21, 2005, at C-1, C-4 (arguing that Microsoft's failure to aggressively attack Google is strong evidence that Microsoft's business behavior has been tempered by the anti-trust trial).

<sup>191</sup> Charles A. James, *The Real Microsoft Case and Settlement*, 16 ANTITRUST A.B.A. 58, 60 (Fall 2001).

duct order may direct the defendant to terminate any exclusive dealing arrangements or to stop bundling goods. Conduct orders may go further and impose affirmative duties on the defendant, including: (1) an obligation to sell to all customers on a non-discriminatory basis; (2) compulsory licensing of intellectual property; (3) separate sale of products now bundled as one product; and (4) creation of products that comply with industry standards as opposed to a company's proprietary standards. A conduct order will generally include affirmative duties because real-world markets operate in real time, and a court cannot simply enjoin conduct and then wait for markets to correct themselves. The defendant, as a successful monopolist, may have driven all rivals and potential rivals from the field. Without some form of mandatory licensing, there may be no entity to join the competitive fray, and no way to restore competitive equilibrium in the marketplace.

Nevertheless, commentators are divided as to whether the net effect of compulsory licensing is to promote competition. In the mid-1970s, the FTC settled its monopolization suit against Xerox with a consent decree requiring Xerox to license royalty free any three of its dry paper copier patents and to cease pursuit of certain infringement claims.<sup>192</sup> Some economists found that the decree promoted entry;<sup>193</sup> others found it inefficient.<sup>194</sup>

Conduct remedies, however, are not always sufficient to protect the public interest. First, conduct remedies concern only future behavior and do not address a company's accumulated market power. Thus, even with an injunction in place, a company may be able to inflict ongoing damage to the economy because of its residual market power. Accordingly, a conduct decree by itself may not be adequate to restore competitive balance in the marketplace.

Second, like the Versailles Treaty, the conduct decree may serve only to provide the battlefield for the next war. The decree may become an ongoing source of friction between the defendant and government regulators. For example, in the *United Shoe Machinery* case, Judge Wyzanski imposed conduct remedies on

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<sup>192</sup> *In re Xerox Corp.*, 186 F.T.C. 364, 373-83 (1975).

<sup>193</sup> F.M. Scherer, *Antitrust, Efficiency, and Progress*, 62 N.Y.U. L. REV. 998, 1016-17 (1987); Timothy F. Bresnahan, *Post-Entry Competition in the Plain Paper Copier Market*, 75 AM. ECON. REV. 15, 15 (May 1985).

<sup>194</sup> See, e.g., DOUGLAS H. GINSBURG, ANTITRUST, UNCERTAINTY, AND TECHNOLOGICAL INNOVATION 30-33 (1980).

the defendant, a shoe-making equipment manufacturer, and rejected the government's calls for divestiture.<sup>195</sup> Ten years later, the government was back in court, arguing that conduct remedies had failed to bring about competitive conditions in the shoe-making equipment marketplace.<sup>196</sup> Judge Wyzanski again balked; but, ultimately, the Supreme Court prodded him to reconsider, and, in the face of certain dissolution, United Shoe Machinery agreed to divest sufficient assets to bring its market share below thirty-three percent.<sup>197</sup>

The third shortcoming of conduct decrees follows from the second: conduct orders require ongoing judicial supervision and may consume an inordinate amount of the supervising judge's time. Invariably, the court becomes enmeshed in petty squabbles among the parties. The ASCAP consent decree is perhaps the best current example of the burdens that conduct decrees impose on the courts. Under that decree, the supervising judge must sit as a rate court when the parties are unable to agree on license fees.<sup>198</sup> A review of the case law reported since the promulgation of the ASCAP decree readily reveals that the courts have had more than their fair share of involvement in the licensing of creative works.

(ii) *Structural Remedies*

Structural relief is invoked by the courts with far less frequency than conduct relief. Structural remedies are more radical than conduct remedies and are appropriate when the court determines that conduct sanctions are not sufficient to get the market back on the competitive track. The Supreme Court has held that it is not enough for a court to merely prohibit specific misconduct; it should also "pry open to competition a market that has been closed by defendants' illegal restraints."<sup>199</sup> Structural relief may include dividing a monopolist into two or more separate companies, perhaps along functional lines. That, of course, is

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<sup>195</sup> *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954).

<sup>196</sup> *United States v. United Shoe Mach. Corp.*, 266 F. Supp. 328 (D. Mass. 1967).

<sup>197</sup> *United States v. United Shoe Mach. Corp.*, 391 U.S. 244 (1968).

<sup>198</sup> *See, e.g., ASCAP v. Showtime/The Movie Channel, Inc.*, 912 F.2d 563 (2d Cir. 1990).

<sup>199</sup> *Int'l Salt Co. v. United States*, 332 U.S. 392, 401 (1947) (quoted in *Ford Motor Co. v. United States*, 405 U.S. 562, 577-78 (1972)).

precisely what the trial court ordered in *Microsoft*.<sup>200</sup> A variation on the foregoing would be to divide a monopolist into two or more competing integrated companies. A third alternative might require some combination of structural and conduct relief. For example, as in *Microsoft* below, a court might order the creation of one or more new rivals and require the monopolist to license intellectual property to those newly created entities.<sup>201</sup>

Structural relief has several advantages over conduct measures. First, structural relief can eliminate market power in one fell swoop.<sup>202</sup> It is a way of jump-starting competition in a victimized marketplace. Structural relief is much more likely than conduct relief to pay long-term procompetitive dividends.<sup>203</sup> Second, structural relief is generally more efficient to administer because, unlike the case of conduct relief, it does not require continuing close scrutiny.<sup>204</sup> Courts do not have to worry about whether a specific practice by a defendant violated a provision of the conduct decree. Courts are therefore less likely to become enmeshed in the minutiae of the decree on an ongoing basis. Nor do courts have to worry about rivals thwarting the procompetitive goals of the conduct decree by engaging in strategic behavior.

Critics of structural relief argue that it is too radical and liken divestiture to curing the disease by killing the patient. They point out that divestiture may lead to market fragmentation and loss of scale economies, which, in turn, may lead to loss of efficiencies.<sup>205</sup> In addition, use of structural remedies may create overdeterrence of wrongful conduct.<sup>206</sup> Faced with the potential of a draconian divestiture, a company may choose to forgo conduct that is, in fact, procompetitive and beneficial to consumers.<sup>207</sup>

Furthermore, critics assert that perceived administrative efficiencies from structural relief are largely illusory.<sup>208</sup> In their view, it is naive to believe that a court can sign a divestiture de-

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<sup>200</sup> United States v. Microsoft Corp., 97 F. Supp. 2d 59 (D.D.C. 2000).

<sup>201</sup> *Id.*

<sup>202</sup> Romaine & Salop, *supra* note 183, at 17-18.

<sup>203</sup> *Id.* at 18.

<sup>204</sup> *Id.* at 18-19.

<sup>205</sup> *Id.* at 19-20.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> Richard B. Schmitt, *A Breakup Primer for Microsoft*, WALL ST. J., June 6, 2000, at B1.

cree and then wash its hands of the matter.<sup>209</sup> They point to Judge Greene's frequent involvement in post-divestiture issues and disputes following the AT&T breakup, particularly those involving line-of-business restrictions.<sup>210</sup> Some critics believe that the line-of-business restrictions themselves are anticompetitive.<sup>211</sup> Finally, critics express concern about the adverse impact of divestiture on employees and shareholders in the form of lost jobs and loss in value of shares.<sup>212</sup> In their view, divestiture is too extreme because it extracts a double penalty. It punishes the company by breaking it up which, in turn, punishes employees and shareholders.

#### *D. Equitable Remedies in the Courts*

In deciding the appropriate antitrust remedy, courts normally look to past decisions. Unfortunately, as noted, the case law on structural remedies is sparse and outdated.<sup>213</sup> Set forth below is a discussion of leading antitrust cases involving equitable remedies. This discussion sheds some light on how courts might resolve questions about equitable relief.

##### *1. Microsoft*

Much has been written about the *Microsoft* case. Media coverage of the trial was unprecedented in scope, and as the *Microsoft* story migrated from the business pages to the front pages of daily newspapers and to lead story on the evening news, even antitrust junkies began to feel like overdose victims. Private actions against Microsoft are ongoing,<sup>214</sup> but the government action has faded from the spotlight. Still, many astute observers of the antitrust scene find an unsettling disconnect between the findings during the liability phase of the case and the ultimate remedy agreed to by the Justice Department to settle the matter.<sup>215</sup>

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<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> William E. Kovacic, *Desizing Antitrust Remedies for Dominant Firm Misconduct*, 31 CONN. L. REV. 1285, 1303 (1999) (noting criticism of the AT&T divestiture decree); John E. Lopatka and William H. Page, *Devising A Microsoft Remedy That Serves Consumers*, 9 GEO. MASON L. REV. 691, 712 (2001) (noting potential adverse effects of a Microsoft dissolution on both shareholders and employees).

<sup>213</sup> See *supra* notes 175-80 and accompanying text.

<sup>214</sup> See, e.g., *In re Microsoft Corp. Antitrust Litig.*, 218 F.R.D. 449 (D. Md. 2003).

<sup>215</sup> Timothy F. Bresnahan, *A Remedy that Falls Short of Restoring Competition*, 16

Following a seventy-six-day bench trial on liability issues, Judge Thomas Penfield Jackson in a detailed opinion found that Microsoft had unlawfully: (1) maintained a monopoly in Intel-compatible PC operating systems; (2) attempted to monopolize the market for Internet browsers; and (3) tied the sale of its Windows operating system to its Internet Explorer.<sup>216</sup> The court found that Microsoft had engaged in a variety of exclusionary acts in order to maintain its monopoly, including: (1) the way in which Microsoft integrated Internet Explorer into Windows; (2) its various dealings with equipment manufacturers and software vendors; (3) its attempts to subvert Java technologies; and (4) its overall course of conduct.<sup>217</sup> After the liability phase of the case had been completed, the court requested that the plaintiffs submit a proposed remedy.<sup>218</sup> The plaintiffs requested specific conduct remedies plus a structural remedy that would split Microsoft into an applications company and an operating systems company.<sup>219</sup> Subsequently, without holding a formal evidentiary hearing on remedies, the court granted the relief sought by the plaintiffs without substantive change.<sup>220</sup>

On appeal, the D.C. Circuit vacated the remedies decree and modified the liability determinations.<sup>221</sup> In a scathing opinion, the appellate court rebuked Judge Jackson for: (1) failing to hold a formal evidentiary hearing on remedies; (2) failing to provide adequate reasons to justify the decreed remedies; and (3) violating the Code of Conduct for United States Judges by talking about the case with reporters.<sup>222</sup> The court of appeals reversed the trial court's determination that Microsoft was liable for at-

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ANTITRUST A.B.A. 67, 67 (Fall 2001). More recently, a reporter who had covered the Microsoft trial questioned whether the outcome in that case had made any difference. Nocera, *supra* note 190. On the one hand, the reporter noted that on the surface things are still pretty much the same as they were prior to trial in that Microsoft still retains monopolies in the Windows operating system and the Office suite of applications. *Id.* at C1. On the other hand, the reporter observed that Microsoft's failure to respond aggressively to the competitive inroads made by Google in web-based applications is strong evidence that its competitive strategy has been tempered by the government's antitrust action. *Id.* at C4.

<sup>216</sup> *United States v. Microsoft Corp.*, 253 F.3d 34, 45 (D.C. Cir.), *cert. denied*, 534 U.S. 952 (2001).

<sup>217</sup> *Id.* at 58.

<sup>218</sup> *Id.* at 48.

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> *See id.* at 98-105.

<sup>222</sup> *Id.* at 107-16.

tempted monopolization and unlawful tying.<sup>223</sup> The court of appeals also reversed eight findings that the trial court had concluded were violations of the antitrust laws.<sup>224</sup> At the same time, the court of appeals affirmed the trial court's core findings that Microsoft had been a monopolist and had committed twelve specific acts of monopolization,<sup>225</sup> a fact that is lost on some revisionist writers. The matter was remanded for a new determination on the remedies issue, and Judge Jackson was disqualified from further participation in the case.<sup>226</sup>

On remand, Microsoft faced not only a new judge but also a revamped government team headed by Charles James, newly appointed by President Bush to lead the Antitrust Division. James made three critical decisions designed to conclude the *Microsoft* case: (1) the demand for structural relief was dropped; (2) the tying claim was abandoned; and (3) the government aggressively pursued settlement negotiations.<sup>227</sup> The matter was thereafter settled, with Microsoft entering into a consent decree in which it accepted certain restrictions on its conduct of business.<sup>228</sup> Critics of the settlement argued that the relief obtained was limited to the unlawful conduct and did not address structural issues, such as barriers to entry, which permitted the Microsoft monopoly to become entrenched.<sup>229</sup> Mr. James had expressed the view that "[r]estoration requires prospective relief to create lost competition and may involve actions to disadvantage the antitrust offender and/or favor its rivals."<sup>230</sup>

The Antitrust Division, on the other hand, was of the view that its hands were tied by what it regarded as the court of appeals' skepticism about the appropriateness of structural relief as well as the appellate court's reversal of the attempted monopolization and tying claims.<sup>231</sup> In its view, relief had to address proven violations, and since the monopoly maintenance claim was the only claim to survive appellate scrutiny, the remedy had to focus on "middleware or middleware-type threats to the operating sys-

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<sup>223</sup> *Id.* at 83-84, 95.

<sup>224</sup> *Id.* at 98-105.

<sup>225</sup> *Id.* at 118-19.

<sup>226</sup> *Id.* at 117-19.

<sup>227</sup> See James, *supra* note 191, at 60-62.

<sup>228</sup> *United States v. Microsoft Corp.*, 231 F. Supp. 2d 144 (D.D.C. 2002).

<sup>229</sup> Bresnahan, *supra* note 215, at 67.

<sup>230</sup> James, *supra* note 191, at 61.

<sup>231</sup> *Id.* at 60.



tem.”<sup>232</sup> Relief could not be comprised of “a laundry list of unrelated requirements competitors might find useful.”<sup>233</sup> While the government has acknowledged that there is unhappiness with the final decree, it has dismissed much of the criticism as sour grapes from competitors pursuing their own self-interests and not necessarily the welfare of consumers.<sup>234</sup>

Still, not everyone accepts the government’s defense of the final decree in *Microsoft*, and critics still question whether that decree and the narrow relief embodied therein will encourage competition and innovation.<sup>235</sup> Indeed, European regulators appear to share the view of critics of the *Microsoft* decree. In its parallel action against Microsoft, the EU, which has broad powers to impose remedies that correct market failure, does not view itself as limited to addressing proven wrongs and has taken a broader view of the remedy needed to cure Microsoft’s abuse of dominant position.<sup>236</sup> Specifically, it has announced that Microsoft, in addition to paying a \$613 million fine, must make versions of Windows available without Windows Media Player.<sup>237</sup> It is precisely this “a la carte” approach that the Antitrust Division rejected out of hand.<sup>238</sup> Time will tell whether the EU’s regulatory approach will be more effective in fostering a competitive environment than the more limited, market-based approach adopted by the Antitrust Division.

## 2. *AT&T*

Structural relief, particularly divestiture, is indeed strong medicine. Nevertheless, when properly prescribed, it can jumpstart competition and restore the marketplace to robust health. The AT&T experience bears this out. Recall the state of telecommunications in the United States in 1974 when the Antitrust Division under Thomas Kauper brought its monopolization case against AT&T, alleging that AT&T used its dominance in local phone service to exclude rivals in long distance service and to exclude rivals in telephone equipment. AT&T dominated local phone service and, through its control of local interchanges, had

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<sup>232</sup> *Id.* at 65.

<sup>233</sup> *Id.* at 64.

<sup>234</sup> *See id.* at 63-64.

<sup>235</sup> *See* Bresnahan, *supra* note 215, at 68.

<sup>236</sup> *See* Commission Decision of 24.03.2004, *supra* note 93.

<sup>237</sup> *Id.*

<sup>238</sup> James, *supra* note 191, at 64.

a lock on long distance phone service. AT&T controlled the manufacture and sale of phone equipment through its subsidiary Western Electric. It also controlled research and development through Bell Labs.

Wireless communication was virtually unheard of. Fax machines and answering machines were in their infancy. The Internet was unknown. The term “modem” was not yet part of our vocabulary. Bell-manufactured rotary phones were state of the art. Long distance calls were expensive. AT&T had nine calling-rate zones in the United States, and a coast-to-coast call was 74 cents per minute for the first minute and 49 cents per additional minute.<sup>239</sup>

After nearly eight years of litigation, and several failed settlement attempts, AT&T agreed to settle the suit with the government.<sup>240</sup> The vehicle for the settlement was the modification of a 1956 consent decree to which AT&T was a party.<sup>241</sup> As a part of the settlement, AT&T agreed to break itself up by divesting its ownership of local phone services.<sup>242</sup> Local phone services would, under the modified consent decree, be owned and operated by seven regional companies, known as Bell Operating Companies (“BOCs”) or Baby Bells.<sup>243</sup> AT&T retained ownership of its long-distance business, equipment manufacturing, and research and development.<sup>244</sup> As part of the modified consent decree, certain line-of-business restrictions imposed on AT&T under the 1956 consent decree were lifted.<sup>245</sup> In 1996, however, AT&T spun off its equipment manufacturing business into Lucent Technologies, Inc.<sup>246</sup> The AT&T divestiture was unprecedented in size and scope.<sup>247</sup> AT&T was a \$150-billion corporation—the largest in the world at the time of the

<sup>239</sup> Rebecca Blumenstein, *How the Split-Up Touched Everyone*, WALL ST. J., June 6, 2000, at B1.

<sup>240</sup> *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff’d sub nom.*, *United States v. Maryland*, 460 U.S. 1001 (1983).

<sup>241</sup> *Id.* at 141.

<sup>242</sup> *Id.*

<sup>243</sup> *Id.* at 141-43.

<sup>244</sup> *Id.* at 226-34; see Floyd Norris, *From a Blue Chip to a Cut Below the Blue-Plate Special*, N.Y. TIMES, July 23, 2004, at C2.

<sup>245</sup> *AT&T*, 552 F. Supp. at 226-34.

<sup>246</sup> Seth Schiesel, *Lucent Announces a Spartan Strategy To Put Itself Right*, N.Y. TIMES, Jan. 25, 2001, at C1.

<sup>247</sup> John Riley, *Legal Upheaval at AT&T; Ma Bell’s Lawyers Gear Up For Divestiture*, NAT’L L.J., Oct. 24, 1983, 1, 1.

breakup—with one million employees nationwide.<sup>248</sup>

The parallels between the *AT&T* and *Microsoft* cases are striking. In both cases, the Antitrust Division challenged illegal practices designed to extend and maintain the monopolies of firms with monopoly power in critical markets. In both cases, the Antitrust Division sought structural relief to preserve and protect competition. In both cases, the Antitrust Division was criticized for challenging a technology leader operating in a critical part of the U.S. infrastructure. In 1974, the *Wall Street Journal* published an especially vituperative editorial attacking the Antitrust Division's investigation of AT&T.<sup>249</sup>

While the Justice Department can't promise any consumer benefits that might result from its suit to break up [the company], it is sure of one thing: This is the largest antitrust action ever filed. So much for the mentality of modern-day trustbusters. As long as they can tackle the biggest of all "big businesses," what is the difference whether the massive expenditure of federal money and effort is likely to cut anyone's . . . bills? Where is the problem that justifies risking possible damage to the efficiency of a vital part of the U.S. infrastructure? Damage to the investments of innumerable small investors and pension fund beneficiaries; possible damage to an important research and development enterprise? If there is a problem that justifies all this we can't find it. Maybe it is because we prefer to deal in economics, rather than politics in such matters.

The similarities between the criticism leveled at *AT&T* in the *Wall Street Journal* over thirty years ago and the criticism of the *Microsoft* enforcement action today are equally striking. Not surprisingly, as Professor Kovacic points out in an excellent law review article, Standard Oil made similar warnings of impending industrial apocalypse in opposing its 1911 divestiture.<sup>250</sup>

Despite those criticisms, the AT&T divestiture has been a resounding success. The breakup unleashed innovation, enhanced services and price competition on an unprecedented scale, all of which inured to the benefit of the consumer.

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<sup>248</sup> Jeremy Main, *Waking Up at AT&T: There's Life After Culture Shock*, *Fortune*, Dec. 24, 1984, at 66.

<sup>249</sup> Untitled editorial, *WALL ST. J.*, November 22, 1974, at 18.

<sup>250</sup> William E. Kovacic, *Designing Antitrust Remedies for Dominant Firm Misconduct*, 31 *CONN. L. REV.* 1285, 1298 (1999).

*a. Price Competition*

Competition in long-distance phone service is robust. Over 100 carriers now offer long-distance service.<sup>251</sup> Long-distance rates have dropped by at least fifty percent.<sup>252</sup> Due to aggressive price competition among AT&T, Sprint, and MCI, the cost of a coast-to-coast call is no more than 29 cents per minute, down from the rate of 74 cents for the first minute and 49 cents per minute thereafter, as noted above.<sup>253</sup>

In addition, many consumers pay as low as 5 cents per minute under discount plans with a monthly fee.<sup>254</sup> Some plans handle local, regional, and long-distance calling so that there is no separate charge for long-distance calls. Moreover, customers may also receive discounts in the form of rebates or membership rewards. Some phone companies offer airline miles. Competition in local phone service is beginning to take shape and also promises savings for the consumer.

*b. Innovation*

The breakup also spawned significant technical advances in telecommunications. Companies replaced aging copper wire lines with fiber-optic cables that provide for clearer and faster transmissions and carry larger volumes of voice and data.<sup>255</sup> Phone lines now provide high-speed access to the Internet. This enhanced capacity has fostered the explosive growth of Internet traffic.<sup>256</sup> Data and voice are now carried in digital rather than analog form. In addition, wireless phones are ubiquitous. Voice activated phones are around the corner, and dial phones are a thing of the past.

*c. New Services*

The breakup also produced a market basket of new services, including three-way calling, call waiting, call forwarding, caller identification, text messaging, and call back.<sup>257</sup> Never before has the consumer faced so much choice.

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<sup>251</sup> Blumenstein, *supra* note 239.

<sup>252</sup> *Id.*

<sup>253</sup> *Id.*

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

<sup>257</sup> *Id.*

On the other hand, the breakup has produced some unpleasant bumps for consumers. First, since the divestiture, local rates for telephones have risen in most areas.<sup>258</sup> In part, this may be due to the fact that local companies have been able to sell additional services to consumers, such as caller identification.<sup>259</sup> No doubt, strategic behavior by the BOCs is also at least partly responsible for the increases. The good news is that burgeoning competition for local phone service has begun to put downward pressure on local rates. Telephone service providers now offer local, regional, and long-distance services in a bundle, permitting consumers to obtain significant savings in overall expenditures for phone services.

Second, many consumers have complained about a decline in service.<sup>260</sup> In the pre-breakup days, one company was responsible for equipment and repair. Service was prompt and included in the monthly bill. Today, it is not always clear whether the equipment provider, the line maintenance provider, or the local phone company is responsible for a problem; finger-pointing is not unusual.<sup>261</sup> Moreover, consumers may have to wait days for repair.

Third, telecommunications companies have been somewhat slow to expand into new areas. It had been hoped under the 1996 Telecommunications Act that phone companies would offer cable television access and thus challenge the local monopolies held by cable companies. Instead, the phone companies seem content to simply acquire cable companies; witness AT&T's acquisition of Media One and its subsequent sale to cable giant Comcast. Some BOCs established by the breakup have chosen to recombine rather than to compete, as was the case with NYNEX and Bell Atlantic merging to form Verizon.<sup>262</sup>

On balance, however, the benefits of the AT&T divestiture far outweigh any problems that have resulted. The AT&T experience offers several important lessons.

1. Structural relief is the most efficient mechanism to rid the

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<sup>258</sup> *Id.*

<sup>259</sup> *Id.*

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

<sup>262</sup> For a report that details the shortcomings of the AT&T settlement, see PETER W. HUBER, *THE GEODESIC NETWORK: 1987 REPORT ON COMPETITION IN THE TELEPHONE INDUSTRY* (1987).

field of anticompetitive conduct and its effects and to jumpstart the restoration of competition in the marketplace.

2. Breaking up a monopolist has the potential of unleashing innovation and competition on a magnitude of that produced by the AT&T divestiture. We are not sure what the nature of that innovation will be. However, keep in mind that in 1974 no one was talking about the Internet.

3. The AT&T divestiture proves that a breakup does not necessarily mean a loss of efficiency. Indeed, the decree permits the new entities to share technical data to prevent the loss of efficiencies.<sup>263</sup>

4. There are likely to be some bumps in the road, as well as some unforeseen problems that will arise as any divestiture unfolds. The judge must be prepared to act swiftly and decisively to address those problems.

### 3. *United Shoe Machinery*

*United Shoe Machinery* also has lessons on remedies, but those lessons go largely to procedure rather than to substance. The first lesson is that a judge must be cautious when fashioning anti-trust remedies:<sup>264</sup>

Judges in prescribing remedies have known their own limitations. They do not ex officio have economic or political training. Their prophecies as to economic future are not guided by unusually subtle judgment . . . . Judicial decrees must be fitted into the framework of what a busy, and none too expert, court can supervise . . . . [A] trial judge is only one man, and should move with caution and humility.

Second, in imposing a remedy, it is the “duty of the Court to prescribe relief that will terminate the illegal monopoly, deny to the defendant the fruits of its statutory violation, and ensure that there remain no practices likely to result in monopolization in the future.”<sup>265</sup>

Third, if it turns out that the initial relief granted by the court did not accomplish these goals, it is “the duty of the court to modify the decree so as to assure the complete extirpation of the illegal monopoly.”<sup>266</sup>

Unfortunately, the experience under the *United Shoe Machinery* decree is not particularly illuminating. We do know that the

<sup>263</sup> See *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 226-34 (D.D.C. 1982).

<sup>264</sup> *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295, 347 (D. Mass. 1953).

<sup>265</sup> *United States v. United Shoe Mach. Corp.*, 391 U.S. 244, 250 (1968).

<sup>266</sup> *Id.* at 251.

conduct strictures were inadequate. However, we cannot definitely decide whether divestiture would have promoted competition because of changing economic conditions in shoes. A decade after reducing its market share to thirty-three percent of the shoe machinery market, United Shoe Machinery was out of business, a victim of the migration of the shoe industry to outside U.S. borders. Ironically, the complex that once housed United Shoe Machinery in Beverly, Massachusetts, is now occupied by high-tech companies.<sup>267</sup>

### *E. Fashioning Equitable Remedies: Some Guidelines*

Unquestionably, *Microsoft* has alerted the bench and the anti-trust bar of the need to rethink equitable remedies in monopolization cases, both substantively and procedurally. Remedies should be at the top of the agenda from the outset of litigation. Enforcers should be considering remedies from the moment an investigation is commenced. Discussion of remedies among the parties should continue throughout the pretrial phase of the case, together with liability issues, but perhaps on a separate track. Once the cards are on the table with respect to remedies, meaningful settlement discussions can proceed. Equally important, if a settlement is not reached, the court must provide a hearing at which the parties can air their views on remedies. Set forth below are some guidelines to help courts fashion appropriate equitable remedies in monopolization cases.

#### *1. Proportionality*

The overarching principle of equitable remedies in monopolization cases is that the remedy must be proportional to the wrongdoing.<sup>268</sup> The more serious the wrongdoing, the harsher the remedy. The seriousness of the conduct is relevant to the remedy because the more serious the conduct, the greater the likelihood that it adversely impacted competition. And, the greater the harm to competition, the more radical the surgery needed to restore competition, and the greater the need to reeducate the marketplace. The goal here is not to punish the wrong-

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<sup>267</sup> David A. Balto, *United Shoe: A Reminder About Relief in Monopolization Cases*, FTC: WATCH, No. 517 (Mar. 1, 1999).

<sup>268</sup> See generally E. Thomas Sullivan, *Comparing Antitrust Remedies in the U.S. and E.U.: Advancing a Standard of Proportionality*, 48 ANTITRUST BULL. 377 (2003) (symposium issue).

doer. Punishment is an appropriate goal in a criminal proceeding and, to a lesser extent, in a private treble damages action. Instead, the proper aim of the injunctive remedy is to restore competition to the marketplace.

By gearing the remedy to specific anticompetitive effects in the marketplace, the doctrine of proportionality minimizes the likelihood of creation of perverse incentives that would either underdeter or overdeter market behavior. The doctrine of proportionality has a long history in European law, and, indeed is a specific criterion for fashioning equitable relief in abuse of dominance cases.<sup>269</sup> The concept of proportionality is not unknown in U.S. law, but it has never been viewed as a specific factor to be taken into account in deciding the nature of equitable relief in monopolization cases.<sup>270</sup> Nevertheless, the proportionality concept is present in what enforcement officials have identified as the necessary requirements of an effective antitrust remedy: (1) stopping the unlawful conduct; (2) preventing its recurrence; and (3) restoring competition to the marketplace.<sup>271</sup>

Unfortunately, U.S. enforcement agencies have not consistently applied these three principles when fashioning equitable remedies.<sup>272</sup> Decrees often focus on the first two elements and do not address restoration of competition in the marketplace.<sup>273</sup> Ignoring the third element creates a serious risk that the ultimate decree will be toothless, as some have argued with respect to the decree in *Microsoft*.<sup>274</sup> On the other hand, taking into account restoration of competition in the marketplace as a goal of antitrust remedy would require the courts and the agencies to examine structural conditions in the marketplace; most importantly, courts and agencies would focus on barriers to entry.<sup>275</sup> Analysis of entry conditions is crucial in creating and evaluating a remedy.<sup>276</sup> If the monopolist's dominant position is insulated by high entry barriers, any decree that does not attempt

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<sup>269</sup> *Id.* at 416-19.

<sup>270</sup> *Id.* at 419-20. Professor Sullivan points out that proportionality principles have played a significant role in the development of constitutional law jurisprudence.

<sup>271</sup> See James, *supra* note 191, at 60-61.

<sup>272</sup> Sullivan, *supra* note 268, at 420.

<sup>273</sup> *Id.*

<sup>274</sup> See Bresnahan, *supra* note 215.

<sup>275</sup> Sullivan, *supra* note 268, at 421.

<sup>276</sup> *Id.*



to lower those barriers would not effectively restore competition and hence is doomed to failure.

## *2. Minimize Harm*

The remedy should be one that minimizes harm to the economy. The Hippocratic Oath<sup>277</sup> enjoins physicians as healers first to do no harm. Courts should follow this principle. The courts must consider both the risk of doing too little, and the losses associated with that approach, as well as the risk of doing too much, and the losses associated with that course of conduct. For example, if the court decrees a conduct remedy, it must measure the risk that the competitive landscape will not change materially over time and the dominant firm will become even more entrenched or that competitors will grow discouraged and walk away. Similarly, if the remedy is too strong, the court must determine the risks that the conduct decree will lead to loss of efficiencies and a chilling of incentive to innovate. Calibrating the risk of harm, however, is no easy task. No one can ever guarantee ex ante that a remedy designed to restore a healthy marketplace will not have undesirable spillover effects.

## *3. Procompetitive Benefits of Challenged Conduct*

The remedy should also take into account the procompetitive benefits of the conduct. Acts that are unambiguously harmful should be treated harshly. Where the offending conduct has redeeming procompetitive benefits, however, less stringent relief would ordinarily be appropriate. Here, again, the court must determine a decree's potential for overdeterrence by chilling potentially procompetitive, and hence beneficial, behavior.

## *4. Strength of Case*

The remedy should relate to the strength of the government's case on liability issues. The stronger the proof on the merits, the harsher the sanction should be. Doubts about the quality of proof call for a milder penalty. Similarly, where the quantum of proof is questionable, more moderate sanctions are appropriate. Strength of proof is important because the stronger the proof, the less likelihood of factual error, and conversely, the greater

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<sup>277</sup> Hippocratic Oath, available at [http://www.pbs.org/wgbh/nova/doctors/oath\\_classical.html](http://www.pbs.org/wgbh/nova/doctors/oath_classical.html). (last visited June 28, 2005).

likelihood that the remedy in question will restore competition to the marketplace.

### 5. *History of Misconduct*

In formulating a remedy, the court must also take into account the past behavior of the defendant. Where the defendant has been subject to conduct decrees in the past but continues to commit illegal acts, conduct restrictions may not be sufficient. Failure to comply with decrees in the past calls into question whether a firm will comply with conduct restrictions in the future and suggests that divestiture is appropriate. Similarly, if conduct decrees have been entered in the past and have failed to rejuvenate competition in a given market, divestiture is the preferred remedy.

### 6. *Resiliency of the Marketplace*

The remedy should take into account the resiliency of the marketplace. An entrenched defendant needs to be uprooted; but where the market is changing rapidly, a less severe remedy may be warranted. Timing is critical. In high-tech markets, which are in a constant state of flux, less aggressive intervention is more appropriate than in traditional markets, which are slower to respond to competitive initiatives and possibly in need of a jump start through divestiture. Courts must be especially cautious in declaring conduct remedies in fast-paced high-tech markets, lest they issue decrees that address behavior that has changed drastically from the time that liability was established and hence bear no relevance to the real-time competitive situation.

### 7. *Cost of Administration*

The remedy must also consider the cost of administration and weigh that cost against the competitive benefit to be achieved.<sup>278</sup> As discussed above,<sup>279</sup> conduct remedies are generally costly to administer because they require ongoing supervision. They also substitute regulation for free market forces. In theory, divestiture achieves the desired goals without need of additional judicial intervention.<sup>280</sup> However, the reality is that even where divestiture is ordered, it is often accompanied by conduct restric-

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<sup>278</sup> Sullivan, *supra* note 268, at 406-10.

<sup>279</sup> See *supra* note 198 and accompanying text.

<sup>280</sup> Sullivan, *supra* note 268, at 406.

tions requiring court supervision.<sup>281</sup> Moreover, even in cases of divestiture, some amount of post-decree judicial monitoring is required, if only to assure that the divested companies do not attempt to reconstitute themselves as a single entity.<sup>282</sup>

#### *F. Deregulation: An Analogy*

Deregulation, while not an antitrust remedy as such, has brought about structural changes in various industries and may inform any discussion of structural remedies. Deregulation started in the 1970s when the Carter Administration began lifting federal controls over airline routes and fares.<sup>283</sup> The results have been spectacular. Fares are down; ridership is up. More people have flown more miles on more flights to more destinations than was ever the case in a regulated regime.<sup>284</sup> The lesson here is simple. Consumer welfare is better served by competition than by regulation. From the perspective of antitrust remedies, this suggests that structural remedies, which normally entail little or no regulation, are superior to conduct remedies, which are by their nature regulatory.

### III

#### ENFORCING SUBSTANTIVE RIGHTS: PROCEDURAL ISSUES

The foregoing discussion demonstrates that the government and private parties may invoke a formidable array of substantive remedies to combat antitrust violations. The Federal Rules of Civil Procedure<sup>285</sup> and the Federal Judicial Code<sup>286</sup> provide the vehicles for enforcing these remedies in federal court. This Part of the Article will discuss whether existing procedural devices are adequate to permit victims of antitrust violations to obtain redress or whether the rules unfairly victimize defendants.

A generation ago, eminent antitrust scholar Milton Handler decried antitrust class actions as “legalized blackmail.”<sup>287</sup> He ar-

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<sup>281</sup> *Id.*

<sup>282</sup> *Id.*

<sup>283</sup> Edwin McDowell, *Five Questions: He Freed the Airlines. But What to Do Now?* N.Y. TIMES, May 16, 1999, § 3 (interview with Professor Alfred E. Kahn).

<sup>284</sup> James C. Miller, III, *Flying High 25 Years After Deregulation*, WASH. TIMES, Oct. 15, 1998, at A15.

<sup>285</sup> FED. R. CIV. P. (codified in 28 U.S.C.).

<sup>286</sup> Codified in 28 U.S.C.

<sup>287</sup> Milton Handler, *The Shift from Substantive to Procedural Innovations in Anti-*

gued that liberalized procedures for class certification embodied in the 1966 amendments to the Federal Rules of Civil Procedure, coupled with the reluctance of courts to dismiss cases prior to trial, had tilted the antitrust playing field decidedly, and unfairly, in favor of plaintiffs.<sup>288</sup> Others claim that notice pleading gives plaintiffs an unfair leg up in litigation.<sup>289</sup> According to these critics, the rules easing plaintiffs' paths to trial increase both the expense and, more importantly, the risks of defending antitrust actions and leave the defendants little choice but to buy peace, irrespective of the merits of the claim.<sup>290</sup>

On the other side, critics maintain that the present procedural system is inadequate. For example, they point out that under the Supreme Court's *Lexecon*<sup>291</sup> decision, district courts assigned multidistrict actions may handle only the pretrial phases of the case and may not retain the case for trial purposes.<sup>292</sup> Sending cases back to their home districts for trial creates obvious inefficiencies and delays.<sup>293</sup> Congress has sought to address the problems of burgeoning multiform, multijurisdictional, and multiparty litigation by expanding federal subject matter jurisdiction.<sup>294</sup> Congress has also expressed concern that courts do not adequately scrutinize class action settlements and approve agreements that provide consumers with little benefit, while awarding attorneys sizable fees.<sup>295</sup> Set forth below is a discussion of these criticisms.

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*trust Suits—The Twenty-Third Annual Antitrust Review*, 71 COLUM. L. REV. 1, 9 (1971).

<sup>288</sup> *Id.* at 10-12.

<sup>289</sup> See, e.g., *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984), *cert. denied*, 470 U.S. 1054 (1985) ("When the requisite elements [of an antitrust claim] are lacking, the costs of modern federal antitrust litigation and the increasing caseload of the federal courts counsel against sending the parties into discovery when there is no reasonable likelihood that the plaintiffs can construct a claim from the events related in the complaint."); see generally Edward D. Cavanagh, *Pleading Rules in Antitrust Cases: A Return to Fact Pleading?*, 21 REV. LITIG. 1, 9-12 (2002).

<sup>290</sup> Handler, *supra* note 287, at 9-10.

<sup>291</sup> *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998).

<sup>292</sup> See JAY TIDMARSH & ROGER H. TRANGSRUD, *COMPLEX LITIGATION AND THE ADVERSARY SYSTEM* 523 (1998); see generally Mark Herrmann, *Self-Transfers Gone After Lexecon?*, N.Y.L.J., Nov. 23, 1998, at 58.

<sup>293</sup> TIDMARSH & TRANGSRUD, *supra* note 292; Herrmann, *supra* note 292.

<sup>294</sup> Class Action Fairness Act of 2005, PUB. L. NO. 109-2, 119 Stat. 4.

<sup>295</sup> *Id.*

### A. Notice Pleading

Notice pleading is a favorite whipping boy of antitrust skeptics,<sup>296</sup> but it is not the culprit that antitrust foes make it out to be. Notice pleading, adopted as part of the Federal Rules of Civil Procedure in 1938, has reshaped the role of the pleadings in federal civil actions.<sup>297</sup> The drafters of the Federal Rules recognized that pleading practices, which had evolved under common law and continued under the codes, were cumbersome and hyper-technical, focusing the court's attention on the form of the allegations in a complaint rather than on the underlying merit of the plaintiff's claim.<sup>298</sup> Not surprisingly, results often turned on form rather than substance, with victory going to the party whose lawyer had a superior knowledge of pleading rules.

The drafters of the Federal Rules were of the view that meritorious claims should have their day in court and that pleadings should facilitate, not hinder, that process.<sup>299</sup> To that end, the Federal Rules adopted a simplified pleading system, commonly known as notice pleading. In the view of the drafters, the most important function of the pleadings is to put the adversary on notice of the claims or defenses being asserted.<sup>300</sup> Accordingly, it is neither required nor necessarily desirable that the complaint assert detailed "facts" giving rise to a "cause of action." Rather, the complaint need only contain a "short, plain statement of facts" upon which the plaintiff's claim for relief depends.<sup>301</sup> It is contemplated that the complaint contain a summary statement of events and occurrences giving rise to the plaintiff's claim and that the details of that claim are developed through pretrial discovery.<sup>302</sup>

Critics argue that notice pleading unfairly stacks the deck against antitrust defendants, forcing them to settle insubstantial claims rather than shoulder the expense of defending such claims.<sup>303</sup> That is simply not the case. First, all pleadings are sub-

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<sup>296</sup> See Cavanagh, *supra* note 289, at 11.

<sup>297</sup> CHARLES ALAN WRIGHT & MARY KAY KANE, *LAW OF FEDERAL COURTS* § 68 (6th ed. 2002).

<sup>298</sup> *Id.*

<sup>299</sup> *Id.*

<sup>300</sup> *Id.*

<sup>301</sup> FED. R. CIV. P. 8(a)(1).

<sup>302</sup> WRIGHT & KANE, *supra* note 297.

<sup>303</sup> Gary Myers, *Litigation As A Predatory Practice*, 80 KY. L.J. 565, 591 (1992) (noting that defendants may choose to settle cases, apart from the merits, to avoid large outlays on discovery).

ject to scrutiny under Rule 11 of the Federal Rules of Civil Procedure. Rule 11 is designed to assure the integrity of pleadings by requiring attorneys to undertake a pre-filing investigation of both fact and law and to certify that the allegations have evidentiary support and are warranted by existing law or by a good-faith argument for changing existing law.<sup>304</sup> If the court finds that the allegations in the plaintiff's complaint are frivolous, then it may exercise its discretion and impose sanctions on the plaintiff, its counsel, or both.<sup>305</sup> The nature of the sanction is also discretionary with the court and may include substantial monetary penalties.<sup>306</sup> Thus, any concern that notice pleading encourages antitrust plaintiffs to file baseless claims is specifically addressed by Rule 11.

Second, complaints can be tested for sufficiency at the outset of the litigation and dismissed if they fail to state a claim upon which relief can be granted pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.<sup>307</sup> In theory, the standards for dismissing claims under Rule 12(b)(6) are stringent.<sup>308</sup> However, the reality is that courts, including antitrust courts, utilize rule 12(b)(6) to eliminate from their dockets cases that, although not baseless, are expensive, time consuming, and have little chance for success at trial.<sup>309</sup>

Third, the merits of a claim can be tested prior to trial—typically at the close of discovery—through a motion for summary judgment pursuant to Rule 56 of the Federal Rules by Civil Pro-

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<sup>304</sup> FED. R. CIV. P. 11.

<sup>305</sup> *Id.*

<sup>306</sup> *Id.*

<sup>307</sup> FED. R. CIV. P. 12(b)(6).

<sup>308</sup> *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) (describing that a complaint will withstand a motion to dismiss unless it appears “beyond [a] doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief”).

<sup>309</sup> See Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 1013-14 (2003).

District courts seemed primed to embrace heightened pleading as a solution to both the rising costs of litigation—chiefly discovery—and mounting federal caseloads. Dismissal at the pleading stage would conserve resources for courts and litigants alike. Not surprisingly, after *Associated General*, lower courts routinely dismissed antitrust complaints for failure to plead with particularity relying on footnote 17 [in *Associated General*].

*Id.* at 1013-14 (footnotes omitted) (emphasis added); see also *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984) (describing that considerations of cost and judicial workload militate in favor of dismissing claims where there is no reasonable likelihood that plaintiff can succeed at trial).

cedure.<sup>310</sup> If a court, treating the allegations in the complaint as true and assuming that the defendant does not contest the plaintiff's evidence, concludes that a reasonable person could not find for the plaintiff, then it must enter summary judgment in defendant's favor.<sup>311</sup> While the federal courts may have been somewhat hesitant about granting summary judgment in early antitrust cases,<sup>312</sup> the Supreme Court made clear in the *Matsushita* case that no special exception to Rule 56 existed for antitrust cases and that summary judgment is as appropriate in antitrust cases as it is in any other area of the law.<sup>313</sup> Since *Matsushita*, courts have regularly granted summary judgment to eliminate from their dockets cases where the evidence adduced by plaintiffs in discovery is not sufficient to create a jury question.<sup>314</sup>

In short, the checks and balances built into the Federal Rules of Civil Procedure—Rule 11 sanctions, Rule 12 motions to dismiss, and Rule 56 motions for summary judgment—offset any argument that notice pleading unfairly tilts the playing field in favor of plaintiffs.

### B. Discovery Rules

In addition to notice pleading, critics of antitrust point to the liberal discovery provisions of the Federal Rules of Civil Procedure as a factor that unfairly favors plaintiffs in antitrust litigation.<sup>315</sup> Again, that criticism is wide of the mark. Discovery is the “Cinderella of changes” under the Federal Rules of Civil Procedure.<sup>316</sup> Unknown at common law, discovery is an equitable device designed to assure parties equal access to proof and thereby prevent trial by ambush.<sup>317</sup> The drafters contemplated that the parties would exchange all relevant, non-privileged material bearing on the subject matter of the action prior to trial.<sup>318</sup> Accordingly, the trial itself would be nothing more than an orderly presentation of what was obtained in discovery.

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<sup>310</sup> FED. R. CIV. P. 56.

<sup>311</sup> *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

<sup>312</sup> See, e.g., *Poller v. Columbia Broad. Sys., Inc.*, 368 U.S. 464 (1962).

<sup>313</sup> *Matsushita*, 475 U.S. at 585-88.

<sup>314</sup> See HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE* § 16.8(b) (2d. ed. 1999).

<sup>315</sup> See Cavanagh, *supra* note 289, at 10-11.

<sup>316</sup> WRIGHT & KANE, *supra* note 297, § 81.

<sup>317</sup> *Id.*

<sup>318</sup> *Id.*

Critics argue that broad discovery puts antitrust defendants at a particular disadvantage because discovery costs are typically so high that cost considerations alone force defendants to settle irrespective of the merits of the case.<sup>319</sup> Unquestionably, discovery under the Federal Rules of Civil Procedure can be very expensive, especially in the complex, document-intensive cases that typify antitrust practice. Indeed, with the dawning of the Big Case Era in the 1960s, the costs of discovery began to soar.<sup>320</sup> At the same time, these costs were inflated by abusive tactical uses of discovery—i.e., use of discovery for the principal purpose of forcing the adversary to expend time and money—and litigants, especially defendants, complained that discovery costs had gotten out of control and that steps needed to be taken to rein in discovery.<sup>321</sup>

In 1983, the Federal Rules of Civil Procedure were amended to provide a proportionality standard for discovery; i.e., discovery must be proportional to the needs of the case.<sup>322</sup> In addition, the 1983 amendments empowered the courts to limit discovery that was repetitive, redundant, or not cost-effective.<sup>323</sup> The 1983 amendments also provided for mandatory sanctions for violations of discovery standards.<sup>324</sup> Finally, courts were encouraged actively to manage discovery so as to minimize delay and inefficiency.<sup>325</sup>

In 1993, the discovery rules were further amended to provide presumptive limits on the number of interrogatories that could be served in a case (twenty-five per side) and on the number of depositions in a case (ten per side).<sup>326</sup> The 1993 amendments sought to achieve further cost savings by mandating disclosure of certain core materials prior to initiating discovery and without the necessity of a request.<sup>327</sup> The 1993 amendments also require

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<sup>319</sup> See Myers, *supra* note 303.

<sup>320</sup> Handler, *supra* note 287, at 7-8.

<sup>321</sup> See Maurice Rosenberg & Warren R. King, *Curbing Discovery Abuse in Civil Litigation: Enough Is Enough*, 1981 BYU L. REV. 579 (1981); Section of Litig. Am. Bar Ass'n, *Second Report of the Special Committee for the Study of Discovery Abuse*, 92 F.R.D. 137, 139 (1982); Wayne D. Brazil, *Civil Discovery: How Bad are the Problems?*, 67 A.B.A. J. 450 (1981).

<sup>322</sup> FED. R. CIV. P. 26(b)(2).

<sup>323</sup> *Id.*

<sup>324</sup> FED. R. CIV. P. 26(g).

<sup>325</sup> FED. R. CIV. P. 16.

<sup>326</sup> FED. R. CIV. P. 33(a).

<sup>327</sup> FED. R. CIV. P. 26(a).



the parties to develop, and the court to approve, a discovery plan prior to the commencement of pretrial discovery.<sup>328</sup> In 2000, the Federal Rules were amended yet again. The 2000 amendments establish a presumptive time limit of one seven-hour day for each deposition.<sup>329</sup>

Thus, in the last twenty years, significant amendments to the discovery rules have limited the amount of discovery and hence its cost, as well as the time necessary to conduct discovery. The Advisory Committee has been responsive to concerns that discovery has become unduly expensive. More importantly, the fact that discovery is expensive puts antitrust defendants at no special disadvantage. Discovery is a two-way street. If discovery is expensive for defendants, it is likewise expensive for plaintiffs. Finally, the discovery rules themselves are party neutral and confer no special benefit on either plaintiffs or defendants.

### C. Class Actions

Critics also cite the perceived ease with which plaintiffs can gain class certification of their claims as yet another example of how the antitrust playing field is tilted against defendants.<sup>330</sup> Rule 23 governing class actions has always been part of the Federal Rules of Civil Procedure. But it was not until 1966, when Rule 26(b)(3) was amended to permit class action treatment in cases where common questions of law or fact predominate over individual issues and the class action device is a superior mechanism for conducting the litigation, that class actions in antitrust cases became commonplace.<sup>331</sup>

The class action procedures offer significant benefits to the litigants and to the judicial system as a whole.<sup>332</sup> First, the class action limits proliferation of litigation and promotes efficiency by allowing the courts to hear claims arising out of common questions of law fact in one action, instead of in many separate suits.<sup>333</sup> Second, the class action levels the litigation playing field by assuring that plaintiffs with meritorious claims giving rise to only nominal damages, which individually would not justify liti-

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<sup>328</sup> FED. R. CIV. P. 26(f).

<sup>329</sup> FED. R. CIV. P. 30(d)(2).

<sup>330</sup> Handler, *supra* note 287, at 9-11.

<sup>331</sup> FED. R. CIV. P. 23(b)(3).

<sup>332</sup> See generally Stephen Calkins, *An Enforcement Official's Reflections on Antitrust Class Actions*, 39 ARIZ. L. REV. 413, 437-45 (1997).

<sup>333</sup> *Id.* at 437-38.

gation expenses of federal actions but would on a class-wide basis, have access to the federal courts.<sup>334</sup> Such actions also prevent defendants from retaining ill-gotten gains and, in that respect, complement the substantive goals of antitrust enforcement. Third, in class action litigation, all members of the class are bound by the court's decision under the doctrines of claim preclusion and issue preclusion.<sup>335</sup>

Notwithstanding these benefits, the class action mechanism is not without its critics. As discussed above,<sup>336</sup> the harshest criticism of class actions was leveled by the late Milton Handler, who described the liberalized version of Rule 26(b)(3) which took effect in 1966 as "legalized blackmail." Handler's concern was that once a class was certified, defendants acting from a business perspective had little choice but to pay a settlement, irrespective of the merits of the case, given the costs and risks inherent in any litigation, especially antitrust litigation.<sup>337</sup>

Perhaps the best response to Handler is that even if the availability of class actions creates incentives to bring extortionate litigation against monied but otherwise guiltless defendants, the civil justice system will counterbalance these incentives, including Rule 12 motions to dismiss,<sup>338</sup> Rule 56 motions for summary judgment,<sup>339</sup> Rule 11 sanctions,<sup>340</sup> and the possibility of interlocutory appeal of the class certification order.<sup>341</sup> Moreover, the certification process itself roots out claims that are not worthy of class treatment. In addition, Handler's fundamental premise is flawed because it implicitly assumes that defendants are *never* guilty of wrongdoing. Because Handler's criticism is loaded with pro-defendant (or anti-plaintiff) bias, it is difficult to lend credence to that view.

A second criticism of class actions is that courts have historically been too hasty in granting class action certification and reluctant to reconsider certification decisions at a later point in the litigation.<sup>342</sup> Rule 23 initially provided that certification deci-

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<sup>334</sup> *Id.*

<sup>335</sup> WRIGHT & KANE, *supra* note 297, § 72.

<sup>336</sup> See *supra* note 287 and accompanying text.

<sup>337</sup> See *supra* note 287 and accompanying text.

<sup>338</sup> FED. R. CIV. P. 12(b)(6).

<sup>339</sup> FED. R. CIV. P. 56.

<sup>340</sup> FED. R. CIV. P. 11.

<sup>341</sup> FED. R. CIV. P. 23(f).

<sup>342</sup> FED. R. CIV. P. 23 (Advisory Committee Notes).

sions be made “as soon as practicable” after commencement of the action and also empowered the courts to grant conditional class certification.<sup>343</sup> The upshot was that courts were more than willing to grant certification at the outset with a view that the issue could be revisited at a subsequent point in the litigation. For defendants, however, granting certification, even conditional certification, was the signal to throw in the towel and settle.

The Advisory Committee was sympathetic to this second criticism and sought to address it in the 2003 amendments to Rule 23, effective December 1, 2003. The drafters made two subtle but profound changes to Rule 23(c). First, the “as soon as practicable” language was changed to “at an early practicable time.”<sup>344</sup> Second, the language authorizing conditional certification was eliminated in the 2003 amendments. The message to the district courts is to slow the certification process down, if necessary, in order to assure that certification decisions are made thoughtfully and not in haste.<sup>345</sup> A more deliberate process is likely to produce a fairer result in the view of the Advisory Committee.<sup>346</sup> Elimination of conditional certification powers also attempts to rectify the perceived imbalance of the class certification process. Conditional certification allowed courts to certify classes for the time being after a quick look at the facts. Rule 23(c) as amended is designed to have courts take a hard look at the facts before issuing a certification order that cannot be lightly revoked.

A third criticism of the class action mechanism is that some class suits are fee generated.<sup>347</sup> As a threshold matter, the fact that suits may be fee generated is not itself a basis for criticism. By providing that prevailing plaintiffs are entitled to attorneys’ fees, Congress fully intended to encourage private enforcement actions in order to maximize antitrust deterrence.<sup>348</sup> Few would argue that point. Critics are concerned, not about fee awards themselves, but rather that fee awards create incentives for plaintiffs’ attorneys to bring marginal, or perhaps baseless, suits in the hope of scoring a quick settlement from vulnerable defend-

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<sup>343</sup> FED. R. CIV. P. 23(c)(1).

<sup>344</sup> FED. R. CIV. P. 23(c)(1) (Supp. 2004).

<sup>345</sup> *Id.* (Advisory Committee Notes).

<sup>346</sup> FED. R. CIV. P. 23 (Advisory Committee Notes).

<sup>347</sup> See *In re Fine Paper Antitrust Litig.*, 98 F.R.D. 48 (E.D. Pa. 1983), *modified*, 751 F.2d 562 (3d Cir. 1984).

<sup>348</sup> 15 U.S.C. § 15 (2000).

ants.<sup>349</sup> This view is a variation of the Handler criticism discussed above.<sup>350</sup> The response again is that Rule 12 motions to dismiss, Rule 56 motions for summary judgment, and Rule 11 sanctions serve to minimize the problem of baseless suits.

There is, however, a second criticism of fee-generated suits. Many class action suits generate substantial fees for counsel but produce little, if any, benefit to the alleged victims of the wrongdoing.<sup>351</sup> Coupon settlements, wherein plaintiffs settle for “cents off” coupons while their attorneys are paid their full fees in cash fall within this category. Coupon settlements may take the form of a discount certificate on future purchases from defendants, or, as in the case of airlines, a right to discounts on future travel. Coupon settlements are of dubious value to the victims of anti-trust violations. First, the plaintiffs may never bother to redeem the coupon. For example, they may not need equipment or desire to travel, or they may simply wish to deal with other vendors. Second, even if they do choose to redeem the coupons, there may be no real financial benefit. For instance, if plaintiffs have a discount certificate to buy equipment from the phone company, they may be able to buy comparable equipment more cheaply from Circuit City or Radio Shack. Similarly, if the plaintiffs receive discounts off of future travel on a given airline, such “compensation” may prove meaningless if they are able to obtain lower net fares through Orbitz or Travelocity. Clearly, the types of coupon settlements described here, which are not atypical, confer no real benefits on the plaintiffs. Equally important, defendants are not forced to disgorge their ill-gotten gains when coupons are not redeemed. In such situations, it is difficult to justify paying attorneys their full fees in cash, instead of in kind.

Congress is attempting to address the inequities of coupon settlements through the Class Action Fairness Act of 2005.<sup>352</sup> First, courts are directed to give careful scrutiny to coupon settlements to assure that these settlements confer a real benefit on plaintiffs (as opposed to plaintiffs’ attorneys).<sup>353</sup> Second, fees awarded to plaintiffs’ counsel would be commensurate with the benefit actu-

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<sup>349</sup> Handler, *supra* note 287, at 9-11.

<sup>350</sup> *Id.*

<sup>351</sup> *In re Fine Paper*, 98 F.R.D. at 67; *see also* Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4.

<sup>352</sup> 119 Stat. § 1 at 4.

<sup>353</sup> *Id.* § 3, at 6.

ally conferred.<sup>354</sup> Thus, coupon settlements would not be barred, but proponents would have the burden of demonstrating their fairness and adequacy. The legislation would certainly curb the widespread abuses in coupon settlements.

A fairer criticism of class actions, which like the third emanates from the consumer protection side, is the limitation on the ability of class members in cases certified under Rule 23(b)(3) to opt out of a settlement in which they do not concur.<sup>355</sup> Whenever a case is certified under Rule 23(b)(3), prospective class members are notified of the nature of the proceedings and their right to opt out of the action.<sup>356</sup> Class members must take affirmative steps to opt out.<sup>357</sup> If they do nothing, they are bound by the courts' rulings as to the class.<sup>358</sup> In particular, class members are bound by any settlements reached by the class representative and approved by the courts.<sup>359</sup> Historically, class members who disapproved of the settlement could file objections with the court and attempt to persuade the court that the settlement would not be fair and adequate;<sup>360</sup> but there was no right to opt out at the settlement stage.<sup>361</sup> If the court approved the settlement over any objections, the dissidents were nevertheless bound.<sup>362</sup>

The 2003 amendments to the Federal Rules addressed this concern by empowering courts, in the exercise of their discretion, to permit dissident class members to opt out of the case at the settlement stage.<sup>363</sup> The Advisory Committee created this possibility out of concern about "forces of inertia and ignorance that may undermine the value of a pre-settlement opportunity to elect

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<sup>354</sup> *Id.*

<sup>355</sup> See Report of the Judicial Conference Committee on Rules of Practice and Procedure to the Chief Justice of the United States and Members of the Judicial Conference of the United States (Sept. 2002) [hereinafter "Report of the Judicial Conference Committee"], available at <http://www.uscourts.gov/rules/jc09-2002/Report.pdf> (last visited June 30, 2005).

<sup>356</sup> FED. R. CIV. P. 23(c)(2).

<sup>357</sup> *Id.*

<sup>358</sup> *Id.*

<sup>359</sup> CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1797 (3d ed. 2002).

<sup>360</sup> *Id.*

<sup>361</sup> *Id.*

<sup>362</sup> *Id.*

<sup>363</sup> FED. R. CIV. P. 23(e)(3) (Supp. 2004); WRIGHT ET AL., *supra* note 359, § 1797 (Supp. 2004).

exclusion.”<sup>364</sup> Simply put, the drafters were concerned that at the time of certification when the opt out decision must be made, putative class members do not fully appreciate the ramifications of failure to opt out until presented with a settlement that they oppose.<sup>365</sup>

Not surprisingly, however, the second opt out concept has been controversial. Opponents argue that: (1) second opt out encourages strategic behavior by class members which complicates the settlement process and may render universal settlements impossible;<sup>366</sup> (2) second opt out encourages free riding by counsel for individual class members, who secure the benefits of actions by class counsel and assert themselves only at the time of settlement;<sup>367</sup> and (3) many individual class members have a significant stake in the litigation and hence to a great extent are immune to the “forces of inertia and ignorance.”<sup>368</sup>

The Advisory Committee struck a middle course by allowing second opt out as a matter of judicial discretion rather than as a matter of individual right. It is far too early to even attempt an assessment of second opt out. Vigilance by the courts in rooting out opportunistic plaintiffs is essential to achieving the goals of fairness and adequacy without undermining the class action remedy as a whole.

#### D. *Lexecon*

In 1969, Congress created the Judicial Panel for Multidistrict Litigation (“JPML”)<sup>369</sup> to address concerns of cost and inefficiency arising from multidistrict litigation. The JPML, *sua sponte*, or upon motion by a party, consolidates actions filed in districts throughout the United States involving common claims against common defendants before one federal judge for pretrial purposes.<sup>370</sup> Once discovery is complete and the case is ready for

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<sup>364</sup> See Report of the Civil Rules Advisory Committee, May 20, 2002, at 63, *available at* <http://www.uscourts.gov/rules/supct1202/CVReport-final.pdf> (last visited June 30, 2005).

<sup>365</sup> FED. R. CIV. P. 23 (Advisory Committee Notes).

<sup>366</sup> See Report of the Eastern District of New York Committee on Civil Litigation Regarding the Proposed 2001 Amendments to the Federal Rules of Civil Procedure, December 6, 2001, at 7-8 (on file w/ author).

<sup>367</sup> *Id.*

<sup>368</sup> *Id.*

<sup>369</sup> 28 U.S.C. § 1407 (2000).

<sup>370</sup> *Id.*

trial, the matter is then sent back to its home district.<sup>371</sup> In creating this legislation, Congress struck a compromise between efficiency and plaintiff's choice of forum. Permitting common cases to be consolidated for pretrial purposes would create significant efficiencies in the discovery process. Requiring the case to be returned to the originating district for trial would honor plaintiff's choice of forum.

Because most cases are either settled or otherwise resolved before the JPML, the provisions requiring trial-ready cases to be transferred back to the district of filing has had little practical effect. These provisions only matter in those rare cases that actually go to trial. From an efficiency perspective, it makes little sense for the JPML judge, who has supervised the case from the beginning and is presumably thoroughly versed in the facts, to send the case to a new judge with no knowledge of the case for trial. The JPML sought to cure the problem by creating a local rule empowering the assigned judge to retain for trial cases that have completed discovery.<sup>372</sup>

This so-called self-transfer provision, however, was struck down by the Supreme Court in *Lexecon*.<sup>373</sup> The Court concluded that it was up to Congress, not the JPML, to decide where cases would ultimately be tried.<sup>374</sup> Although it has debated the issue, Congress has not yet taken steps to overrule *Lexecon*. This is a situation that Congress can, and should, remedy immediately by authorizing JPML-assigned judges to retain matters for trial. The systemic concern for efficiency far outweighs the interests of individual litigants in retaining the right to try their cases in the forum of initial filing.

#### *E. Multijurisdictional, Multidistrict, Multiparty Claims*

Historically, nearly all antitrust litigation has been conducted in federal courts. In large part, this is due to the fact that jurisdiction under the antitrust laws is exclusively federal; i.e., federal antitrust claims may not be asserted in state courts.<sup>375</sup> Antitrust claims could, however, be asserted in state courts under state

<sup>371</sup> *Id.* An exception to the rule is the in *parens patriae* cases brought under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, where the assigned judge was authorized to retain the case for trial purposes. *Id.* § 1407(h).

<sup>372</sup> J.P.M.L. R. 14(b).

<sup>373</sup> *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998).

<sup>374</sup> *See id.* at 28.

<sup>375</sup> *See supra* note 45 and accompanying text.

law.<sup>376</sup> Still, most attorneys choose to proceed in federal court under federal law. There are several explanations for this decided preference for federal courts. First, the federal law is generally much better developed and more broadly applicable than state law. Second, the Federal Rules of Civil Procedure are much more user-friendly than some archaic state procedural codes. Third, rightly or wrongly, many attorneys perceive federal judges, who are appointed by the President for life tenure, to be more competent than state court judges, many of whom are elected.

In the last decade, a new litigation paradigm has emerged. More and more antitrust litigants are turning to state court for relief. In large part, this is due to the Supreme Court's 1977 decision in *Illinois Brick*, which held that only those who purchased directly from price-fixers, and not others in the chain of distribution, could sue for damages under the antitrust laws.<sup>377</sup> Accordingly, consumers and other potential plaintiffs in price-fixing cases who had overcharges passed onto them by direct purchasers were precluded from suing under federal law.<sup>378</sup> In the wake of *Illinois Brick*, many states enacted "*Illinois Brick* repealer" statutes permitting indirect purchasers to sue in state courts.<sup>379</sup> Thus, state law may provide an avenue of relief foreclosed by federal law.

*Illinois Brick*, however, is not the only explanation for the migration to state court. Some attorneys believe that they can extract a better bargain by proceeding in state court, separately from a class action pending in federal court. Where there are multijurisdictional lawsuits, it is impossible to get all cases before one judge by invoking the JPML. Because all parties are not before a single judge, it is not possible for defendants to achieve peace by resolving the federal cases. State court claimants are free to, and often do, engage in strategic behavior and thereby exact a better deal than their JPML counterparts. The greater the number of state cases filed, the more vexing the problem of strategic behavior becomes.

Another reason that attorneys seek out state venues is the belief that they will get a better result in state court. Many antitrust

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<sup>376</sup> See *supra* note 44 and accompanying text.

<sup>377</sup> *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

<sup>378</sup> *Id.*

<sup>379</sup> See *supra* note 50 and accompanying text.



plaintiffs' attorneys view federal judges as hostile to antitrust claims. State court judges are perceived to be more hospitable to antitrust claims because: (1) they see such claims infrequently and are reluctant to dismiss claims prior to trial, and (2) they are elected and do not want to be perceived as anti-consumer.

In addition, some attorneys want to be in state court because they believe that fee petitions will receive less scrutiny in state court as opposed to federal court. Equally important, in state court the attorney is captain of the ship and not at the mercy of lead counsel as would be the case in JPML proceedings.

Whatever the reason underlying the migration of antitrust litigation from federal to state courts, this proliferation of antitrust filings involving common issues of fact and law has effectively thwarted the ability of the federal civil justice system to manage complex litigation that is nationwide in scope and has imposed significant burdens on the state courts. Congress has recognized this problem and has attempted to address it through the Class Action Fairness Act of 2005.<sup>380</sup> That law expands federal diversity jurisdiction to permit most antitrust cases currently filed in state court under state law to be removed to federal court.<sup>381</sup> The Act could be an important step forward because it once again enables the federal courts under the JPML to transfer all cases involving common claims against common parties to one judge for pretrial proceedings and settlement discussions. However, the Act is not a complete solution to the problem. It does not address the issue of transfer by the JPML for *trial*, as well as pretrial, purposes. Nor does it address the panoply of substantive problems that arise in attempts by indirect purchasers to establish injury under the antitrust laws. Still, the law is an important step forward in addressing a burgeoning problem.

#### *F. Coupon Settlements*

The Class Action Fairness Act of 2005 also addresses a concern of consumer groups that settlements in which plaintiffs receive coupons or other types of in-kind payments are not fair and adequate and therefore should not be approved by the court.<sup>382</sup> The principal concern is that in cases involving coupon settlements, attorneys normally get their full fees in cash, while the victims of

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<sup>380</sup> Pub. L. No. 109-2, 119 Stat. 4 (2005).

<sup>381</sup> *Id.*

<sup>382</sup> *Id.*

wrongdoing are left with paper which they may or may not redeem, and which, in any event, may confer no real benefits. In such cases, there is an obvious potential for conflict of interest because an attorney who is going to be paid in cash may not have the interests of coupon-receiving clients at heart. The legislation would address this problem by: (1) requiring the courts closely to scrutinize coupon and other in-kind settlements for fairness and adequacy; and (2) limiting attorneys' fees to the *actual* value of the settlement, not the stated value.<sup>383</sup>

## IV

### ASSESSMENT

#### A. *Enforcement Policies*

##### 1. *Federal Enforcement*

The enforcement policies of the Antitrust Division and the FTC reflect an increasingly sophisticated understanding of microeconomic principles and how certain business practices promote competition while others inure to the detriment of the consumer. Over the last fifteen years, a bipartisan consensus has emerged regarding the goals of antitrust enforcement.<sup>384</sup> During that time, the agencies have focused investigative and prosecutorial resources on bread-and-butter issues—horizontal price-fixing and division of markets, and mergers that threaten to raise prices or reduce output.<sup>385</sup> That approach is prudent and should continue. The Justice Department's use of criminal sanctions to punish cartel behavior and to deter future transgressions is likewise on target.

In addition, there is widespread recognition that in a globalized economy, the United States' antitrust laws cannot operate in a vacuum.<sup>386</sup> Foreign cartel behavior that adversely affects U.S. consumers must be prosecuted as aggressively as domestic violations. To that end, cooperation with foreign antitrust authorities is essential. Efforts to promote common procedural and substantive norms have been ongoing.<sup>387</sup> Those efforts should continue and should not be sidetracked because U.S. and EU regulators

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<sup>383</sup> *Id.*

<sup>384</sup> See generally Pitofsky, *supra* note 52.

<sup>385</sup> *Id.*

<sup>386</sup> *Id.*

<sup>387</sup> See Int'l Competition Policy Advisory Comm'n Antitrust Div., Final Report to the Attorney General and Assistant Attorney General for Antitrust, Annex 1-C

have reached differing conclusions on similar facts as was the case in *Microsoft*<sup>388</sup> and the GE/Honeywell<sup>389</sup> merger. Antitrust regulators worldwide share much common ground; the focus of international enforcement efforts should be on what unites us, not what divides us.

## 2. State Antitrust Enforcement

### a. Public Enforcement

Although Judge Posner makes a powerful argument for federal preemption in antitrust enforcement,<sup>390</sup> it would be a mistake to eliminate state antitrust jurisdiction. States have an important role in the overall antitrust enforcement picture. First, the states serve a watchdog function to assure that federal authorities do not abdicate their enforcement responsibilities. It was the perception that federal authorities had indeed abdicated their responsibilities that galvanized the states into action in the 1980s and made states players in the antitrust game. Much has been done in the last fifteen years to bridge the ideological gap that once existed between federal and state enforcers and to generate a cooperative rather than contentious atmosphere. Today everyone is pretty much on the same page. It is unlikely that the experience of the Reagan years will recur, but online state antitrust enforcement agencies protect against the creation of any enforcement void.

Second, states are well-equipped to handle essentially local matters, including bid-rigging in state and local government procurement and indirect purchaser suits, whether on behalf of the state or consumers *parens patriae*. In addition, state regulators can play an effective role in the consumer protection area.<sup>391</sup> In other areas, specifically mergers, states as a rule should defer to federal authorities, absent a strong state interest in a particular transaction that has been overlooked in the federal investigation.

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(2000), available at <http://www.usdoj.gov/atr/icpac/finalreport.htm> (last visited June 30, 2005).

<sup>388</sup> Commission Decision of 24.03.2004, *supra* note 93; see Meller, *supra* note 93, at 1.

<sup>389</sup> Commission Decision of 03/07/2001, *supra* note 92.

<sup>390</sup> See Posner, *supra* note 66.

<sup>391</sup> Remarks of Timothy J. Muris before New York State Bar Association, NYSBA 2004 Antitrust Law Section Symposium, at 57 (Jan. 29, 2004) (“Our partners in the states are extremely important . . . in both competition and consumer protection, although the states put more resources obviously into consumer protection than they do into antitrust.”) (on file w/ author).

This is especially true in cases where the merging parties are foreign. The need for U.S. enforcement authorities to speak with one voice will ordinarily trump local interest in challenging a merger. Third, states can perform a support role in nationwide or international cases brought by federal authorities.<sup>392</sup>

*b. Private Enforcement*

Less clear is the role of private enforcement actions in state court. Private antitrust actions in state court tend to fall into three categories: (1) cases involving purely intrastate restraints, (2) indirect purchaser suits, and (3) cases involving nationwide or international conspiracies in which plaintiff's counsel has chosen state court over federal court.

The third class of cases is troublesome. By eschewing federal court in favor of state court, plaintiffs' attorneys effectively thwart the ability of the federal courts to utilize multidistricting procedures<sup>393</sup> effectively to manage dockets, minimize duplicative efforts, assure consistency of judgments, and avoid unnecessary delays. Such tactics also avoid federal court scrutiny of settlements and attorneys' fees. While suing in state court may be in the interest of the plaintiff's attorney, it is not necessarily in the plaintiff's interest and certainly not in the best interest of the civil justice system. As more fully discussed below,<sup>394</sup> Congress' attempt to eliminate this form of strategic behavior by expanding federal jurisdiction to permit removal of these types of cases to federal court is an important step forward.

*B. Remedy*

*1. Damages*

The treble damages remedy is the cornerstone of private antitrust enforcement. It is a potent weapon; but given the potentially devastating effect that antitrust violations, especially price-fixing, may have in the marketplace, the treble damages remedy is ultimately necessary to (a) preserve free markets, (b) deter future violations, (c) compensate victims, (d) disgorge ill-gotten

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<sup>392</sup> A textbook example of cooperation between state and federal authorities occurred during the investigation of the Thomson-West merger in 1996. States contributed significant resources to review of documents, interviewing of facts and expert witnesses, and depositions.

<sup>393</sup> Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4.

<sup>394</sup> See *infra* notes 399-400 and accompanying text.

gains, and (e) punish violators. Elimination of treble damages across the board would seriously impair the private remedy, and the case for taking this drastic step has simply not been made.

On the other hand, opponents of mandatory trebling have a point that trebling is neither fair nor desirable in every case.<sup>395</sup> The problem with this view is that it is difficult to draw the line between treble and simple damages; every proposal has its downsides as well as its benefits.<sup>396</sup> This issue needs further debate. At the end of the day, however, antitrust enforcement would probably be best served by leaving mandatory trebling in place and by letting Congress decide which types of antitrust violations should be detrebled. Congress should proceed with utmost caution in any foray into selective detrebling.

## 2. *Equitable Relief*

In the merger area, there is consensus on enforcement norms, and available remedies are adequate to the problems that arise from potentially anticompetitive transactions. Still, it would be desirable for the enforcement agencies to bring more merger challenges in court so that the case law can develop more fully.

The non-merger area is another story. Much work needs to be done in determining how to fashion remedies in monopolization cases. *Microsoft* did not fulfill its promise of providing the twenty-first-century standard for structural relief. The existing law on divestiture by monopolists is old and appears less relevant by the day. If any progress is to be made in this area, then it is up to the Antitrust Division to continue aggressive enforcement of Section 2 of the Sherman Act.<sup>397</sup>

However, this may be easier said than done. In the wake of the final resolution of the *Microsoft* case, the Antitrust Division may understandably be gun-shy about tackling another industry giant. More importantly, recent decisions, notably the *Trinko* case,<sup>398</sup> seem to take a kinder, gentler approach to monopolists. The upshot is that it is getting harder for plaintiffs to win on *lia-*

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<sup>395</sup> See Cavanagh, *supra* note 96, at 847.

<sup>396</sup> *Id.*

<sup>397</sup> 15 U.S.C. § 2 (2000).

<sup>398</sup> See, e.g., *Verizon Commc'ns, Inc. v. Law Offices of Curtis v. Trinko, LLP*, 540 U.S. 398, 407 (2004) (stating that monopoly "is an important element of the free-market system"); see also *United States v. AMR Corp.*, 335 F.3d 1109, 1111 (10th Cir. 2003) (stating that predation by reputation is not an appropriate surrogate for below-cost pricing in a predatory-pricing case).

*bility* issues in Section 2 Cases; courts are not even reaching the *remedies* issues. The fact that the existing precedents on court-ordered divestiture are at least forty years old only fuels arguments of antitrust foes that antitrust law has not kept pace with the changing face of the business world and is thus largely irrelevant in today's economy.

### C. *Procedural Remedies*

All in all, the procedural remedies available to federal antitrust litigants are working well. The Federal Rules of Civil Procedure provide checks and balances that assure fairness to all litigants. Nevertheless, the system would benefit from several surgical improvements.

First, Congress should overrule the Supreme Court's decision in *Lexecon*<sup>399</sup> and thereby permit the JPML, in its discretion, to retain cases for both trial and pretrial purposes. This move would significantly reduce cost and delay in multidistrict litigation.

Second, Congress should expand federal subject matter jurisdiction so that all antitrust cases arising from a common nucleus of operative fact, whether initiated in state or federal court, can be consolidated before the JPML for pretrial and trial purposes.<sup>400</sup> This legislation would eliminate the current procedural problem created by indirect purchaser suits, which are barred in federal court by *Illinois Brick* but may be brought in state court under state law. Among other things, the legislation would (1) prevent attorneys from forum shopping for pro-plaintiff courts, (2) foster efficiency in the administration of complex antitrust litigation by reducing costs and duplication in discovery and by permitting the assigned JPML judge to hear the matter at trial, (3) encourage universal settlements by creating a mechanism to get all parties to a dispute before a sole judge, and (4) limit the opportunities for plaintiffs' lawyers to engage in strategic behavior in cases originating in state court. The Class Action Fairness Act of 2005, while a step in the right direction, is unlikely to achieve these ends because statutory loopholes permitting "local" controversies to stay in state court may serve to thwart efforts at removal in a significant number of cases.

Third, judges must take seriously recently enacted legislation

<sup>399</sup> *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998).

<sup>400</sup> Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4.

that requires federal courts to scrutinize settlements in antitrust cases in order to assure that plaintiffs are being paid something of value when they settle cases and also to ensure that attorneys' fees do not eclipse payments to plaintiffs.<sup>401</sup> As a general rule, coupon settlements should be rejected unless the parties can demonstrate to the court that the plaintiffs are getting real value.

#### CONCLUSION

Although the economy has evolved significantly in the last century, antitrust is as relevant today as it was when the Sherman Act was passed in 1890. Since that time, a broad consensus on enforcement policies and substantive liability has emerged. It is time to forge a similar consensus in the field of antitrust remedies.

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<sup>401</sup> *Id.*

